In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. ~~77-~~6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Of Counsel

In the

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No.

HAROLD RAMSEY,

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THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of New York to review the affirmance of a judgment of conviction entered against him on September 17, 1976, in the Supreme Court of Kings County. If accepted by the Court, this case would present the question of whether, consistent with due process, a trial judge may gratuitously inject himself into the plea bargaining process for the purpose of inducing a guilty plea, and, to that end, threaten that if the defendant is convicted after trial he will receive a sentence nearly four time greater than one once seriously discussed, and twice as great as the one then held out as part of a plea offer. By sustaining the validity of a guilty plea so obtained herein, the courts of New York have decided, incorrectly we think, an important constitutional question, which was specifically left open in Brady v. United States* and not reached in Bordenkircher v. Hayes,** and which has not been, but ought to be, settled by this Court.

*397U.S.742 (1970)
**___U.S.___, 98S.Ct.663 (1978)

Opinions Below

The Appellate Division of the Supreme Court of New York, Second Department, affirmed the judgment of conviction below without opinion. (See, Appendix A, infra.) On March 17, 1978, leave to appeal to the Court of Appeals of New York was denied by Hon. Charles D. Breitel, Chief Judge of that Court. (See, Appendix B, infra.)

Jurisdictional Statement

The order of the Appellate Division affirming the judgment was dated February 6, 1978. Jurisdiction to review it is conferred upon this Court by 28 U.S.C. Sec. 1257(3)

Question Presented

Whether a guilty plea is obtained in violation of due process of law when it is induced by a judge's threat that, should the defendant be convicted after trial, he will receive a sentence almost four times greater than one once seriously discussed, and more than twice as great as the one then held out as part of a plea offer.

Constitutional Provisions at Issue

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

Statement of the Case

In 1975, the petitioner was named in two felony indictments, each accusing him of a robbery alleged to have been committed in Brooklyn, New York. When one of the cases reached a trial part in Supreme Court, Kings County, the judge there presiding learned that a plea agreement had previously been reached and then rejected by the petitioner in a conference held before a different judge. That agreement had called for the petitioner to plead guilty to one lesser robbery count in full satisfaction of all charges in both indictments, and had provided that he would receive a sentence no greater than a term of imprisonment of from three and a half to seven years.

The trial judge then suggested that, were the District Attorney again to agree to such a plea, the same disposition would probably be acceptable to the court. The petitioner, however, forestalled further discussion by insisting that he was innocent.

Proceedings upon the indictment then commenced with a Wade hearing.* Before the court announced its findings, however, the petitioner suddenly offered to plead guilty, now to a higher robbery charge to satisfy both indictments. The plea was entered upon the understanding that the petitioner would now receive an increased sentence of not less than six and not more than twelve years imprisonment.

The circumstances prompting the petitioner's abrupt change of heart were not to be fully disclosed on the record until he appeared for sentence. On that day, the court had before it his motion to withdraw the plea. The motion was supported by trial

*United States v. Wade, 388 U.S. 218 (1967); Criminal Procedure Law of New York (hereinafter, CPL) Section 710.20[5](Consolidated Laws of New York, Book 11A, McKinney's 1971).

counsel's affidavit in which he averred, inter alia, "[t]hat since the inception of [his] assignment to defend him, the [petitioner] has maintained his innocence of the charges against him under [both] Indictments." The court agreed to hear and decide the motion then and there, and the District Attorney took no part in the exchanges that followed.

The judge began by reading portions of the transcript of the petitioner's plea allocution in which, under the court's questioning, he had agreed that he had participated in the crimes charged. When permitted to speak in his own behalf, however, the petitioner repudiated those admissions and explained why he had made them. He said:

> The only reason I took that plea on that day is because you harassed my lawyer in front of the Jury, you understand? You intimidated him.*
>
> * * *
>
> That is why I took my plea.
>
> * * *
>
> I am telling you I am not guilty. The only reason I took my plea is because I was coerced. You also told my attorney if I have a trial, you will give me twelve to twenty-five years, and he told me that.**

Thereafter, to support and clarify the petitioner's assertions, trial counsel offered his own account of the circumstances

*The trial judge apparently had deviated from statutory procedure by ordering jury selection prior to the Wade hearing. (CPL, supra Sec. 710.40[3])

**When it became clear that the court would not permit withdrawal of the plea, the petitioner inexcusably resorted to profanity and invective directed at the trial judge. For this misconduct, the petitioner was summarily, and appropriately, punished for contempt of court and sentenced to thirty days to be served prior to the commencement of the sentence imposed on the conviction.

surrounding the petitioner's sudden decision to plead guilty:

> It was a Miss Walker, your Honor, and it was the only one that took the stand [at the Wade hearing], and after that witness, there was some talk about a plea of guilty, and at that time, the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.
>
> I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.
>
> * * *
>
> ...We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at the time I did, Judge. I gave him that warning.
>
> (Emphasis supplied)

The judge did not deny having instructed counsel to deliver that message to his reluctant client. He said only that the imposition of the threatened twelve and a half to twenty-five year sentence would have been "[s]ubject of course to me [sic] reading the probation report."

Ultimately the court denied the motion to withdraw the plea and imposed the promised six to twelve year sentence. Having read into the record the petitioner's unfavorable probation report the court remarked:

> ...The [petitioner] shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive.
>
> (Emphasis supplied.)

As heretofore noted, the judgment of conviction has been affirmed in the Appellate Division, and leave to appeal to New York's highest court has been denied. The petitioner, presently incarcerated pursuant to the judgment of conviction, now seeks certiorari solely to review the question of whether, by reason of the coercive conduct of the trial court, his guilty plea is

invalid as having been obtained in violation of due process of law.

ARGUMENT

> WHEN A TRIAL JUDGE THREATENS A DEFENDANT WITH A HARSHER SENTENCE IF CONVICTED AFTER TRIAL IN ORDER TO INDUCE HIM TO PLEAD GUILTY, SERIOUS DUE PROCESS QUESTIONS ARISE.BECAUSE THOSE QUESTIONS, AS YET UNRESOLVED BY THIS COURT, ARE OF CENTRAL IMPORTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE, AND BECAUSE THIS CASE SO SQUARELY PRESENTS THEM, CERTIORARI SHOULD BE GRANTED HEREIN.

In Brady v. United States, supra, 397 U.S. 742 (1970), this Court held that, in and of itself, a defendant's exposure to the death penalty upon conviction after trial did not render his guilty plea to a lesser charge involuntary. The Court took care to point out, however, that

> We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.*
>
> (Id. at 751 n.8.) (Emphasis supplied.)

In contrast, in the case at bar, the trial judge did indeed threaten the petitioner with a harsher sentence if convicted after trial -- and he clearly did so solely for the purpose of inducing him to plead guilty. After having heard a witness testify at the Wade hearing, and after having read a very unflattering probation report regarding the petitioner, the trial judge nevertheless felt that "six to twelve [years] is enough time for this man to receive." The threatened twelve and a half to twenty-five year term, then, was shown to have been nothing more than a device employed

*This comment, taken in the context of the case, strongly suggests that the result reached might have been different had a reluctant Brady tendered his guilty plea only after having received from the court a direct and gratuitous warning that, if he insisted on going to trial and were convicted, he would be sentenced to death.

by the court to induce the unwilling petitioner to plead guilty, for it was fully twice the term the judge thought appropriate even in view of the petitioner's background and the crimes charged.

This Court has recently addressed an important aspect of the plea bargaining process. It has recognized that "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial," and it has "accepted as constitutionally legitimate... that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." Bordenkircher v. Hayes, supra, ___U.S.___, ___, 98 S.Ct. 663, 668 (1978). It is beyond dispute, however, that a vast difference exists between the role of a prosecutor acting as one party to a bargaining process, and that of a trial judge vested with the authority and responsibility of presiding over the procedures through which criminal charges are to be resolved. See, e.g., Parker v. United States, 397 U.S. 790, 804 (opinion of Brennan J., in which Douglas, J. and Marshall, J. joined); United States v. LaVallee, 319 F. 2d 308, 319 (2nd Cir 1963)(Marshall, then Circuit Judge, dissenting.)

In many quarters, any kind of judicial participation in plea bargaining is frowned upon, but even the strongest criticisms do not comtemplate the sort of blatantly coercive pre-trial judicial interference evidenced in the record below. See, Note, Plea Bargaining and the Transformation of the Criminal Process, 90 HARV. L. REV. 564, 583-585 (1977); cf. Euziere v. United States 249 F. 2d 293 (10th Cir. 1957); Scott v. United States, 419 F2d. 264 (D.C. Cir 1969); United States v. Tateo, 214 F. Supp. 560(SDNY 1963).

In any event, however, this Court has not yet delineated the constitutional limits of judicial participation in plea bargaining, and, as demonstrated by the conduct of the trial judge below and by the affirmance in the appellate courts of New York, such guidance would appear to be both necessary and overdue. A state trial judge simply may not be permitted to abandon his neutral station in order actively to induce the surrender of a defendant's constitutional right to trial by jury. Were it otherwise, our system of criminal justice would be unable to accord an accused any semblance of due process of law. In Bordenkircher, supra, this Court examined the perimeter of the constitutionally permissible conduct of a prosecutor during plea bargaining. The petitioner now requests that a similar inquiry be undertaken into judicial participation in the same process. He therefore asks that certiorari be granted in order to afford the Court an opportunity to condemn the manner in which the guilty plea herein was obtained, and to establish constitutional standards by which a properly impartial role for our nation's judiciary may be restored.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, A PETITION FOR CERTIORARI SHOULD BE GRANTED HEREIN.

Dated: Brooklyn, New York
April 5, 1978

Respectfully submitted,
RHODES & FISHER
Counsel to the Petitioner
16 Court Street
Suite 1210
Brooklyn, New York 11241
(212) 624-3784

STEVEN W. FISHER
Of Counsel

APPENDIX A

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on February 6, 1978

HON. JAMES D. HOPKINS, Justice Presiding
HON. VITO J. TITONE,
HON. JOSEPH A. SUOZZI,
HON. CHARLES MARGETT, } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Harold Ramsey,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Harold Ramsey,

defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered September 17, 1976;

and the said appeal having been submitted by Steven W. Fisher, Esq., of counsel for the appellant, and submitted by Laurie Stein Hershey, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate Division

B/mc

____AD2d_____ A - January 19, 1978

127 E The People, etc., respondent,
v. Harold Ramsey, appellant.

Rhodes, Baker & Fisher, Brooklyn, N.Y. (Steven W. Fisher of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Laurie Stein Hershey of counsel), for respondent.

Judgment of the Supreme Court, Kings County, rendered September 17, 1976, affirmed. No opinion.

HOPKINS, J.P., TITONE, SUOZZI and MARGETT, JJ., concur.

February 6, 1978. PEOPLE v RAMSEY, HAROLD 127 E

APPENDIX B

State of New York
Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

HAROLD RAMSEY,
Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
March 17, 19 78

Chief Judge

Steven W. Fisher, Esq.
16 Court Street
Brooklyn, New York 11241

Hon. Eugene Gold
District Attorney, Kings County
Municipal Bldg.
Brooklyn, New York 11201

Clerk, Court of Appeals

*Description of Order: 2-6-78 App Div 2 affmd. 9-17-76 Sup. Ct., Kings Co.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

—against—

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

PETITION FOR CERTIORARI FILED APRIL 10, 1978
CERTIORARI GRANTED OCTOBER 10, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

—against—

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

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RELEVANT DOCKET ENTRIES IN SUPREME COURT, KINGS COUNTY

Date	Part	Action	Judge
9/8/75	1A	Kings County Hospital Report Confirmed; Indictment No. 2588/75 Consolidated into Indictment No. 431/75; Defendant Pleads Guilty to Robbery in The Second Degree.	Vetrano, J.
12/19/75	1A	Plea Withdrawn—No Bail.	Vetrano, J.
1/13/76	10	Bail Set: $2,500.	Jordan, J.
8/3/76	52	Wade Hearing.	Held, J.
8/4/76	52	Defendant Pleads Guilty to Robbery in The First Degree under Indictment No. 2588/75 to Cover Indictment No. 431/75.	Held, J.
9/17/76	52	Defendant Sentenced as Second Felony Offender to 6-12 Year Term of Imprisonment; Adjudged in Contempt of Court and Sentenced to 30 Days to be Served Prior to the Commencement of the Sentence Imposed on the Conviction.	Held, J.

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

Indictment No. 2588/1975

[Filed June 6, 1975]

THE PEOPLE OF THE STATE OF NEW YORK

against

HAROLD RAMSEY, DEFENDANT

COUNTS

ROBBERY IN THE FIRST DEGREE
(4 counts)

GRAND LARCENY IN THE THIRD DEGREE
(4 counts)

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, forcibly stole certain property from REBECCA WALKER, to wit: a quantity of United States Currency, and in the course of the commission of the crime and of immediate flight therefrom the defendant used and threatened the immediate use of a dangerous instrument.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, forcibly stole certain property from

REBECCA WALKER, to wit: a quantity of United States Currency, and in the course of the commission of the crime and of immediate flight therefrom, the defendant displayed what appeared to be a pistol, revolver or other firearm.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of GRAND LARCENY IN THE THIRD DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, stole certain property from REBECCA WALKER, to wit: a quantity of United States Currency, having an aggregate value of more than two hundred and fifty dollars.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of GRAND LARCENY IN THE THIRD DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, stole and took from the person of REBECCA WALKER, certain property to wit: a quantity of United States Currency.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, forcibly stole certain property from CORRINE MUNDY, to wit: a quantity of United States Currency, and in the course of the commission of the crime and of immediate flight therefrom the defendant used and threatened the immediate use of a dangerous instrument.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, forcibly stole certain property from CORRINE MUNDY, to wit: a quantity of United States Currency, and in the course of the commission of the crime and of immediate flight therefrom, the defendant displayed what appeared to be a pistol, revolver or other firearm.

SEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of GRAND LARCENY IN THE THIRD DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, stole certain property from CORRINE MUNDY, to wit: a quantity of United States Currency having an aggregate value of more than two hundred and fifty dollars.

EIGHTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of GRAND LARCENY IN THE THIRD DEGREE, committed as follows:

The defendant, on or about December 30, 1974, in the County of Kings, stole and took from the person of CORRINE MUNDY, certain property to wit: a quantity of United States Currency.

/s/ Eugene Gold
EUGENE GOLD
District Attorney

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM
PART 52

Ind. No. 2588/75

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD RAMSEY, DEFENDANT

MINUTES OF PLEA

August 4, 1976
Supreme Court House
Brooklyn, New York

BEFORE:

HON. GERALD S. HELD

APPEARANCES:

FOR THE PEOPLE
EUGENE GOLD, ESQ.
District Attorney—Kings County
BY: JOHN W. HESTER, ESQ., A.D.A.

FOR THE DEFENDANT
JOHN AVANZINO, ESQ.

[2] THE COURT: The defendant wishes to take a plea. You will have to move to consolidate for the purpose of the plea. He will plea to rob one and the promise will be six years minimum, twelve years maximum.

MR. HESTER: That is acceptable, Your Honor. At this time, the People move to consolidate Indictment 431 of '75 into Indictment 2588 or '75 for purposes of disposition.

THE COURT: Mr. Avanzino, I will hear you.

MR. AVANZINO: If Your Honor please, at this time, the defendant Harold Ramsey, previously pleaded not guilty to both Indictments, 431 of '75 and 2588 of '75 and now withdraws those pleas of not guilty to 431 of '75 and 2588 of '75, which are now merged into the Indictment of 2588 of '75 and hereby interposes a plea of guilty to robbery in the first degree, to Indictment Number 2588 of '75.

THE COURT: Mr. District Attorney.

MR. HESTER: Yes, Your Honor.

THE COURT: Do you have any objection to the application of the defendant?

MR. HESTER: No, Your Honor. It's satisfactory [3] to the People.

THE COURT: I want the District Attorney to be aware on the record as he is already aware off the record that I made a promise and the promise to be that the sentence will be a minimum six, a maximum of twelve, New York State Department of Correctional Services. Does the District Attorney take a position on sentence at this time?

MR. HESTER: No, Your Honor. No petition at this time nor will we take a position at the time that sentence is imposed by the Court.

THE COURT: I just want the record to show that you are aware of the promise and you continue to recommend acceptance of the plea, without necessarily taking a position one way or the other.

MR. HESTER: That is exactly the People's position.

THE COURT: All right, Harold Ramsey, is John Avanzino, standing next to you, your attorney?

THE DEFENDANT: Yes.

THE COURT: Do you understand that he has made an application on your part, on your behalf, to have you plead guilty to the crime of robbery in the first degree to cover Indictment No. 2588 for [4] the year 1975 and 431 for the year '75? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that in doing so, you are giving up your right to a trial by jury, which we have already picked. We had our twelve jurors

and two alternates. Do you understand that, don't you? You have to answer yes or no. Can't shake your head.

THE DEFENDANT: Yes.

THE COURT: You are also giving up your right to confront the People's witnesses. You are giving up your right to be proven guilty beyond a reasonable doubt. You are giving up your right to certain constitutional safeguards, to protect your constitutional rights, such as, the identification hearing which we have completed but which I have not ruled upon. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand also that you are giving up your right of cross-examination of witnesses, to produce witnesses on your own behalf and to testify in your own behalf even though you have no obligation to do any of those things. Do [5] you understand that?

THE DEFENDANT: Yes.

THE COURT: Mr. Avanzino explained all of that to you?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the legal services rendered on your behalf by your attorney, John Avanzino?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced you or threatened you or convinced you, against your will, to take this plea of guilty?

THE DEFENDANT: No.

THE COURT: Are you pleading guilty because you are guilty and because you are voluntarily doing it?

THE DEFENDANT: Yes.

THE COURT: Now, I have made a promise to you and you have heard the promise but I am going to state it again to make sure we understand each other. I promise you that at the time of sentence, I will sentence you to a confinement of a minimum of six years, a maximum of twelve years. Is that your understanding of the promise?

[6] THE DEFENDANT: Yes.

THE COURT: Has anyone made you a promise which is different than mine just now?

THE DEFENDANT: No.

THE COURT: Has anyone told you anything different concerning sentence other than what I have just told you now?

THE DEFENDANT: No.

THE COURT: Are you totally reliant upon any promise and my promise only?

THE DEFENDANT: Yes.

THE COURT: Now, in all case, not just yours, but in all cases with all defendants, I always reserve to myself the right to break my promise if it turns out, in my discretion, I feel that I have to. Now, I don't know if I would have to and I don't think so at this moment. I know of no reason why I should have to break my promise to you at the time of sentence. But, always in every case, I always reserve to myself the right to break the promise if it turns out that I feel that I have to. If I break my promise, I will give you the right to withdraw your plea, to wipe the slate clean of what has just taken place now and restore you to [7] your original position of being not guilty to both Indictments. Do you understand and agree to that?

THE DEFENDANT: Yes.

THE COURT: Now, in order for me to accept your plea, I must have a statement from you. The statement must be truthful, it must be made of your own free will and accord and it must be a complete and full statement. Are you willing to make that kind of a statement?

THE DEFENDANT: Yes.

THE COURT: Then, tell me what took place in Brooklyn on December 30th, 1974, in the evening of that day at premises 776 Franklin Avenue, Brooklyn, New York, which is a beauty parlor.

THE DEFENDANT: Robbed the people.

THE COURT: You say that you robbed the people. Did you go in there with a gun?

THE DEFENDANT: Yes.

THE COURT: And what did you tell the people when you had the gun? Did you tell them that you wanted their money?

THE DEFENDANT: Yes.

THE COURT: Did you point the gun at them?

[8] THE DEFENDANT: Yes.

THE COURT: How much money did you take, approximately?

THE DEFENDANT: About $150.00.

THE COURT: Is that statement satisfactory to the District Attorney?

MR. HESTER: Yes, Your Honor. I believe it makes out the elements of a robbery.

THE COURT: Does the District Attorney want a statement also on Indictment 431 of the year '75?

MR. HESTER: Yes, Your Honor.

THE COURT: Tell me then what took place in Brooklyn on January 20th, 1975 concerning yourself and a man by the name of Bobby Lawrence.

THE DEFENDANT: Robbed a store.

THE COURT: Did you have a weapon?

THE DEFENDANT: Yes.

THE COURT: What kind of a weapon did you have?

THE DEFENDANT: The co-defendant had the weapon.

THE COURT: Your co-defendant had a weapon. Did you know that he had a weapon?

THE DEFENDANT: Yes.

[9] THE COURT: When you went into the store with your co-defendant, why did you go in there? What was the reason for you going in there?

THE DEFENDANT: To rob the store.

THE COURT: Did you, in fact, rob the store?

THE DEFENDANT: Yes.

THE COURT: How much money did you take in that robbery, approximately?

THE DEFENDANT: I don't know. I never counted it.

THE COURT: Was it more than $50.00?

THE DEFENDANT: I don't know.

THE COURT: Where did you get the money from, from the man's person or from a drawer or what?

THE DEFENDANT: Person and drawer.

THE COURT: Is this statement satisfactory to the People?

MR. HESTER: That is satisfactory, Your Honor.

THE COURT: I will ask the Clerk to kindly arraign the defendant. Take his plea.

THE CLERK OF THE COURT: What is your name?

THE DEFENDANT: Harold Ramsey.

THE CLERK OF THE COURT: Mr. John Avanzino, stands beside you, is he your attorney?

[10] THE DEFENDANT: Yes.

THE CLERK OF THE COURT: Before your plea of guilty is accepted, you are advised by direction of the Court that a plea is equivalent to a conviction after trial. You are further advised that if you have previously been convicted of a predicate felony as such is defined by Section 70.06 of the Penal Law that fact may be established after your plea of guilty in this action before this Court now and you will be subject to different or additional punishment.

Having been so advised, do you now withdraw your plea of not guilty previously entered to Indictment No. 2588 of '75 and now plead guilty to offense of robbery in the first degree, said offense being a Class B Felony? This plea to cover Indictment 431 of '75. You so plead guilty?

THE DEFENDANT: Yes.

THE CLERK OF THE COURT: Date of sentence?

THE COURT: Date of sentence, Tuesday, September 14th, if that is convenient for counsel.

MR. AVANZINO: Could Your Honor make that the following Tuesday? Would that be possible, Judge?

THE COURT: No, because—I don't want to [11] give Probation any more than the five weeks that they require.

MR. AVANZINO: Could Your Honor make it sometime later in that week? Would that be permissible or acceptable to Your Honor?

THE COURT: If it will convenience counsel, I will do it. What date do you want?

MR. AVANZINO: I would like Friday, September 17th, if I can have it.

THE COURT: Okay, Friday, September 17th for sentence.

THE CLERK OF THE COURT: Remand the defendant.

* * * *

CERTIFIED TO BE A TRUE AND CORRECT
TRANSCRIPT OF MINUTES IN THIS CASE

/s/ Lawrence Fields
LAWRENCE FIELDS
Official Court Reporter

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

Indictment Nos. 431/75 and 2588/75

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD RAMSEY, DEFENDANT

NOTICE OF MOTION TO WITHDRAW PLEA OF GUILTY—TO BE REFERRED TO THE HON. MR. JUSTICE GERALD HELD

Dated September 10, 1976

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavits of HAROLD RAMSEY, and JOHN B. AVANZINO, ESQ., duly sworn to the 10th day of September, 1976, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at Criminal Term, Part I thereof, held in and for the County of Kings, at the Supreme Court Building, 360 Adams Street, on the 22nd day of September 1976, at 9:30 in the forenoon of that day or as soon thereafter as counsel can be heard for an order, pursuant to Section 220.60 (Subd 3) Code of Criminal Procedure, permitting the above-named defendant to withdraw his plea of guilty heretofore interposed, and to enter a plea of not guilty to indictment Nos. 431/75 and 2588/75, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
September 10, 1976

Yours, etc.,

JOHN B. AVANZINO
Attorney for def. by assignment
Office & P.O. Address
25 Plaza Street
Brooklyn, New York 11217
212-638-5957

TO: HON. EUGENE GOLD,
District Attorney, Kings Cty.
Municipal Building
Brooklyn, New York 11201

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD RAMSEY, DEFENDANT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

AFFIDAVIT OF PETITIONER,
SWORN TO ON SEPTEMBER 10, 1976

HAROLD RAMSEY, being duly sworn, deposes and says:—

1. I am the defendant herein, indicted under indictment nos 431/75 and 2588/75, charged with Robbery I under each indictment, and make this affidavit in support of the instant application to withdraw my plea of guilty interposed August 4, 1976.

2. I was arrested on January 20, 1975 and have been in jail ever since.

3. On August 2, 1976, my trial was started in Part 52 Criminal Term, Supreme Court, Kings County, before the Hon. Mr. Justice Gerald Held. On that date, after a conference at the Bench with my assigned counsel, the Asst. District Attorney and the trial judge, I was offered a term of 3½ years minimum to 7 years maximum to cover both indictments. I repeated to my attorney that I was innocent and asked to go on with the trial.

4. On August 4, 1976, after a Wade Hearing held in Part 52, I was informed by the trial judge, through my assigned counsel that if I went to trial and was convicted, I would be sentenced to 12½ years minimum and 25 years maximum. Upon hearing this staggering jail sentence, and being wearied by having already spent so much time in jail, to wit, 1½ years awaiting trial, I

jumped at the offer of a lesser jail term, and against my better judgment, pleaded guilty to crimes I did not commit. Upon reflection, I realize that I was confused, afraid, and did not fully understand the consequences of taking a guilty plea.

WHEREFORE, I respectfully pray that I be permitted to withdraw the plea of guilty interposed August 4, 1976, and in its stead, to interpose a plea of not guilty to both indictments, namely 431/75 and 2588/75.

/s/ Harold Ramsey
HAROLD RAMSEY

[Jurat (omitted in printing)]

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD RAMSEY, DEFENDANT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

AFFIDAVIT OF DEFENSE COUNSEL
JOHN AVANZINO, SWORN TO ON
SEPTEMBER 10, 1976

JOHN B. AVANZINO, being duly sworn, deposes and says:

1. I am 18B attorney for the defendant herein, having been assigned to his defense on July 23, 1976 by the Hon. Mr. Justice Frank Vaccaro.

2. That since the inception of my assignment to defend him the defendant has maintained his innocence to the charges against him under Indictment Nos. 431/75 and 2588/75.

3. That on August 2, 1976, at the trial of the within matter, the Hon. Mr. Justice Gerald Held and the District Attorney's office offered the defendant 3½ years minimum to 7 years maximum. The defendant, repeating his innocence to me, refused the offer and asked to proceed to trial.

4. That on August 4, 1976, a Wade Hearing was conducted before the Hon. Mr. Justice Gerald Held, and prior to the determination thereof, the defendant was offered 6-12 years, and after consultation with me, the defendant took the guilty plea.

5. That thereafter on or about August 10, 1976, defendant called me and said he wanted to withdraw his guilty plea.

6. At a conference held with me at the Brooklyn House of Detention on September 2, 1976, the defendant told me that at the time he took the plea he was confused and afraid and that he didn't fully understand the consequences of his plea, and that now that he had time to think about it, he wanted to withdraw his plea of guilty.

WHEREFORE, since the defendant has so steadfastly maintained his innocence to the charges against him, in the interest of justice, it is respectfully prayed that the defendant be permitted to withdraw his plea of guilty and that the issue of his guilt or innocence be decided by a jury of his peers.

/s/ John B. Avanzino
JOHN B. AVANZINO

[Jurat (omitted in printing)]

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM
PART 52

(Ind. 2588/75)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD RAMSEY, DEFENDANT

MINUTES OF SENTENCE,
DATED SEPTEMBER 17, 1976

Brooklyn, New York

BEFORE:

HON. GERALD S. HELD, Justice.

APPEARANCES:

NORMAN SILVERMAN, ESQ.,
Assistant District Attorney
For the People

JOHN BAVANZINO, ESQ.,
Attorney for the Defendant.

[2] THE CLERK: Indictment 2588 of 1975, Harold Ramsey.

MR. SILVERMAN: If it please the Court, I am serving copy of the predicate felony statement to the attorney for the defendant.

The Defendant is also standing alongside of him, and I am filing the original with the Clerk of the Court.

THE COURT: Arraign the defendant as a predicate felon.

THE CLERK: What is your name?

MR. BAVANZINO: If Your Honor please, before the arraignment commences, I would like to apprise the

Court of the fact that on the 10th of September, I filed a notice of motion.

THE COURT: I am aware of that, and we are advancing it.

It is to vacate the plea, correct?

MR. BAVANZINO: Correct, Judge.

THE COURT: But, first let me get the preliminaries out of the way. Let's see if your client is a predicate felon, and then we will [3] determine whether or not we should vacate his plea or not, and if yes, yes.

If no, I will sentence him as a predicate felon.

Is there any objection to that procedure?

MR. BAVANZINO: No, sir.

THE COURT: Okay, fine.

THE CLERK: What is your name?

THE DEFENDANT: Harold Ramsey.

THE CLERK: Harold Ramsey, is Mr. John Bavanzino standing besides you, is he your attorney?

THE DEFENDANT: Yes, he is.

THE CLERK: Pursuant to Section 400.21 of the Criminal Procedure Law, the District Attorney has filed a statement with the Court alleging that prior to the commission of the felony for which you now stand convicted, you have previously been convicted of and sentenced as a predicate felon, and you may be a second felony offender as defined in Section 70.06 of the Penal Law.

I ask you if you have received a copy of [4] that statement?

THE DEFENDANT: Yes.

THE CLERK: By direction of the Court, you will now be advised of your rights in this matter.

If you wish to controvert any allegation in the statement, you must specify the particular allegation or allegations you wish to controvert. Any uncontroverted allegations shall be deemed to have been admitted by you.

The question to be determined is whether or not you wish to controvert any allegation made in the statement.

Where the uncontroverted allegation in the statement are sufficient to support a finding that you have been

subjected to a predicate felony conviction, the Court must enter such finding and when imposing sentence, must sentence you as a second felony offender in accordance with the provisions of Section 70.06 of the Penal Law.

In the event the controverted allegation [5] in the statement and the uncontroverted allegations are not sufficient to support the finding that you have been subjected to a predicate felony conviction, second felony conviction, the Court will conduct a hearing to determine the issue or issues so created.

You are also advised that you may raise an objection that a previous conviction alleged in the statement was obtained in violation of your rights under the applicable provisions of the Constitution of the United States, whether it be a prior conviction of this or any other jurisdiction.

If you raise such objection, it will be entered in the record and will be determined after a hearing by the Court without a Jury.

You are further advised your failure to challenge previous convictions shall constitute a waiver on your part of any allegation or unconstitutionality unless good cause be shown for your failure to make a timely challenge.

You are represented by your attorney, Mr. [6] Bavanzino, and you now stand besides him.

You may consult with him and give us your decision.

Please answer the following question:

Have you read the statement?

THE DEFENDANT: Yes.

THE CLERK: Do you wish to controvert any allegation made in the statement?

THE DEFENDANT: No.

THE CLERK: Do you raise the objection that any previous conviction alleged in the statement was obtained in violation of your constitutional rights?

THE DEFENDANT: No.

THE CLERK: The defendant does not raise any controversion nor does he challenge the constitutionality of the prior convictions.

THE COURT: For the purposes of the sentence, he is adjudicated a prior predictate felon, second felony offender.

Now, we have a motion before us.

Would you state the nature of that motion [7] that we are advancing?

I know it was on for a later date. We are advancing it at this date, and the District Attorney has no objection to that.

It is a motion to vacate the plea, is that correct?

MR. BAVANZINO: Yes, Your Honor.

THE COURT: Mr. District Attorney?

MR. SILVERMAN: I have no notice of it, your Honor.

THE COURT: Well, we will take a look at it.

MR. SILVERMAN: I have no objection.

THE COURT: Do you have any objection to advancing it for today?

MR. SILVERMAN: No, I do not, your Honor.

THE COURT: And, the defense counsel waives any written reply rather than taking oral arguments, is that correct?

MR. BAVANZINO: Yes.

THE COURT: All right.

Mr. Bavanzino, as I understand it, your [8] client wishes to withdraw his plea and says that he entered into the plea because he was mixed up and confused, upset, acting under duress, misguided, and also he is innocent, that is basically correct, sir?

MR. BAVANZINO: First, if your Honor please—

THE COURT: Your client nods his head yes, I state that for the record.

MR. BAVANZINO: If Your Honor please, I would like to state this to the Court.

THE COURT: Certainly.

MR. BAVANZINO: Your Honor, has lumped the two affidavits together, mine and Mr. Ramsey's.

THE COURT: I am taking all the contentions at once.

MR. BAVANZINO: My affidavit is one and his affidavit is another, your Honor, and as to the subject of my affidavit, that is what I said.

As to the subject of his affidavit, that is what he said, but based upon that I have no objection.

THE COURT: Mr. Bavanzino, I do not mean [9] to attribute all of those to you or all of those to him, but rather, I am saying that is the conglomerate or the whole situation, right?

MR. BAVANZINO: That is the overall picture, yes, Your Honor.

THE COURT: Now, I want to read into the record from the plea minutes of August 4, 1976, certain statements that were made.

"THE COURT: Do you understand that your lawyer has made an application on your behalf to have you plead guilty to the crimes of Robbery in the First Degree and cover indictment 2588 of 1975, and 431 of 1975; do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand in doing so, you are giving up your right to trial by Jury, which we have already picked. We had our twelve Jurors and two alternates. Do you understand that; you have to answer yes or no.

You cannot shake your head.

"THE DEFENDANT: Yes.

And then later on it goes on like this:

"THE COURT: Are you satisfied with the [10] legal services rendered on your behalf by your attorney, John Bavanzino?

"THE DEFENDANT: Yes.

"THE COURT: Has anyone forced you or threatened you or convinced you against your will to take this plea of guilty?

"THE DEFENDANT: No.

"THE COURT: Are you pleading guilty because you are guilty and because you're voluntarily doing so?

"THE DEFENDANT: Yes.

"THE COURT: Now I made a promise to you, and you heard the promise, but I am going to state it again to make sure we understand each other. I promise you at the time of sentence I will sentence you to confinement of a minimum of six years and a maximum of twelve years. Is that your understanding of the promise?

"THE DEFENDANT: Yes."

Going on later on in the minutes again.

"THE COURT: Now, in order for me to accept your plea, I must have a statement from you. The [11] statement must be truthful. It must be made of your own free will and accord and it must be a completely full statement.

"Are you willing to make that kind of a statement?

"THE DEFENDANT: Yes.

"THE COURT: Then tell me what took place in Brooklyn on December 30, 1974, in the evening of that date at premises 776 Franklin Avenue, Brooklyn, New York, which is a beauty parlor?

"THE DEFENDANT: Robbed the people.

"THE COURT: You say you robbed the people, did you go in there with a gun?

"THE DEFENDANT: Yes.

"THE COURT: And, what did you tell the people when you had the gun, did you tell them you wanted their money?

"THE DEFENDANT: Yes.

"THE COURT: Did you point the gun at them?

"THE DEFENDANT: Yes.

"THE COURT: How much money did you take approximately?

[12] "THE DEFENDANT: About a hundred and fifty dollars.

"THE COURT: Tell me what took place in Brooklyn on January 20, 1975, concerning yourself and a man by the name of Bobby Lawrence?

"THE DEFENDANT: Robbed a store.

"THE COURT: Did you have a weapon?

"THE DEFENDANT: Yes.

"THE COURT: What kind of a weapon did you have?

"THE DEFENDANT: The co-defendant had the weapon.

"THE COURT: Your co-defendant had a weapon, did you know he had a weapon?

"THE DEFENDANT: Yes.

"THE COURT: You went into the store with the co-defendant, why did you go in there; what was the reason for you going in there?

"THE DEFENDANT: To rob the store.
"THE COURT: Did you in fact rob the store?
"THE DEFENDANT: Yes.
"THE COURT: How much money did you take in that robbery, approximately?
[13] "THE DEFENDANT: I don't know. I did not count it.
"THE COURT: Was it more than fifty dollars?
THE DEFENDANT: I don't know.
"THE COURT: Where did you get the money from, from the man's person or a drawer or what?
"THE DEFENDANT: Person and drawer."
Now, there are many other parts of this plea that I could read into the record, the allocution was rather long, and rather complete, even if I say so myself.
Now, are you telling me, Mr. Ramsey, that you lied to the Court?
THE DEFENDANT: Yes, I am telling you this.
You want to let me talk now?
THE COURT: I would like you to answer the questions.
THE DEFENDANT: I'm going to tell you everything.
Now, you finished?
The only reason I took that plea on that day is because you harassed my lawyer in front of [14] the Jury, you understand?
You intimidated him.
THE COURT: I want you to answer my questions.
You keep talking.
THE DEFENDANT: What are you telling me?
You are a gangster. You keep quiet.
THE COURT: Get a gag.
THE DEFENDANT: That is why I took my plea.
THE COURT: When I tell you I will listen to you, I will listen to you, but not until then.
You will not run my courtroom.
THE DEFENDANT: I'm not trying to run your courtroom. I am facing twelve years to twenty-five, not you. I give less than a fuck about a courtroom.

THE COURT: You don't dare use profanity in a courtroom.
THE DEFENDANT: I don't care anything, but do you understand, so stop raising your voice about me.
You asked me.
[15] THE COURT: You stop raising your voice.
THE DEFENDANT: I am telling you I am not guilty. The only reason I took my plea is because I was coerced.
You also told my attorney if I have a trial, you will give me twelve to twenty-five years, and he told me that.
THE COURT: Stop raising your voice.
THE DEFENDANT: You also started making remarks about a mess of people in the beauty parlor and you already had me tried and convicted.
You said that is my line of work.
When my lawyer said to you that he was ready, we came to the courtroom and you asked my attorney, and he said yes, and you said you are going to trial, and my attorney said yes, and you said I guess your client is innocent.
You are motherfucking right I am innocent.
THE COURT: Don't you dare use profanity in the courtroom.
THE DEFENDANT: Then take the handcuffs off.
[16] If you are a man, take them off.
THE COURT: I sentence you to thirty days in Criminal Contempt of this Court.
THE DEFENDANT: I want my plea back, that is all.
THE COURT: I want a gag for this man, because I am going to put something on the record and I don't want him interrupting me.
Get the gag.
THE DEFENDANT: I want my plea back.
I want my plea back.
THE COURT: Do you want to answer the question I put to you?
THE DEFENDANT: Yes.
THE COURT: Did you lie to me?
THE DEFENDANT: Yes, I did.
THE COURT: Are you lying now?

THE DEFENDANT: No, I am telling the truth.

THE COURT: How am I to tell the difference since you are admittedly a liar?

THE DEFENDANT: I am innocent and the only reason I took the plea is because you are prejudice.

[17] I know I cannot get a fair trial from you, and I definitely don't trust you. It is impossible to get a fair trial in front of you.

THE COURT: The application for the withdrawal of the plea is in all respects denied.

The Court will not belabor the record by retorting to the vile accusations and the language that was used by the defendant.

It is without foundation. It is without reason, and it is in fact not only incorrect, but a falsehood.

THE DEFENDANT: You ain't sentencing me, man. You ain't brushing me off like Al Capone or some other man. This motherfucker is prejudiced and roughing me off and you don't trust me because you are a sap. You understand this, motherfucker?

You won't let me take my plea back. This motherfucker is not a Judge, he is a dictator. He should have been with Mussolini and Hitler.

THE COURT: Sit him down.

THE CAPTAIN: You want the restraint belt on him?

[18] THE COURT: Only if it proves necessary.

So far he hasn't been violent to the extent that he has used physical force.

Mr. Bavanzino, I apologize for what is a distasteful experience for you and for me also.

I have previously adjudicated the defendant to be in contemptuous conduct of the court, Criminal Contempt of this Court, and I have sentenced him to thirty days summarily. I do this on the basis of his conduct in this court.

The fact that he interrupted the Court repeatedly, the tone of his voice and the profanity that he used, despite the fact that I warned him and told him not to use profanity, I will not have this conduct by any defendant under any circumstances in my court.

I have reviewed the file. I have reviewed the application of counsel.

Is there anything further you want to say, Mr. Bavanzino, concerning this sentence and concerning the application?

MR. BAVANZINO: Just, Your Honor, that the [19] first time we had a discussion on this matter at the bench between the District Attorney and your Honor and myself, I believe that was on August the 2nd, and 3rd, Judge.

THE COURT: This is prior to the Wade Hearing and prior to the selection of the Jury?

MR. BAVANZINO: Yes, Your Honor.

THE COURT: And, I believe I know what you are about to tell me, and please correct me if I am wrong.

You are going to tell me that the District Attorney would tell me you are going to give a plea to Robbery Two to cover both indictments, and you asked the Court well whether I would under those circumstances give three and a half to seven years, and I said if the District Attorney would go along on the Robbery Two, I would probably do the same, subject, of course, of me looking at the probation report.

Is that correct, Mr. Bavanzino?

MR. BAVANZINO: That is basically what I wanted to say.

[20] THE COURT: And, you consulted with your client and he said no, he does not want to take the plea of three and a half to seven, and he did not want to take the plea.

MR. BAVANZINO: At that time he indicated further that he was innocent at that time. Then the next day or the day after the Wade Hearing—after the completion of the Wade—

THE COURT: I believe we had two ladies testify in that case, is that correct?

MR. BAVANZINO: Yes, Your Honor.

THE COURT: I remember it.

THE DEFENDANT: One lady that testified.

MR. BAVANZINO: One lady that testified, and the second one I don't think took the stand, Judge.

THE COURT: Maybe it was interrupted. I never did make findings of facts and conclusions of law in that case, because there was a plea.

MR. BAVANZINO: It was a Miss Walker, your Honor, and it was the only one that took the stand, and after that witness, there was some talk about a plea of guilty, and at that time, [21] the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.

I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.

THE COURT: The District Attorney offered Robbery One only at that point, is that correct?

MR. BAVANZINO: My memory is that he did at that time, Judge. We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.

Your Honor told me to take that back to my client which at the time I did, Judge. I gave him that warning.

THE COURT: Subject of course of me reading the probation report. It is a practice in my court when there is an armed robbery, to give [22] a maximum sentence, unless there are mitigating circumstances.

MR. BAVANZINO: Well, I think your Honor in light of everything, that that was the basis of why the defendant took the plea.

THE COURT: Are yc telling me that you knew when he pleaded guilty, that he was not actually guilty?

MR. BAVANZINO: I did not know that, your Honor, we can never know anything about a client. We have to go by what the client tells us.

THE COURT: That is exactly the point I am trying to make with you.

When he pleaded guilty, you believed him to be guilty?

MR. BAVANZINO: I assumed as your Honor did that he was guilty. I assumed that.

THE COURT: You were ready for trial?

MR. BAVANZINO: I was ready. We had selected a Jury and two alternates. Your Honor knows that.

You were the trial Judge on the case.

[23] However, he called me down, and he called my office from the Brooklyn House of Detention some three or four days after this incident, and he asked me to come down to the Brooklyn House of Detention and when I got time, I did go down to the Brooklyn House of Detention, and he said I want to withdraw my plea.

I said why don't you think it over, and I will come back in a week or so. I went back again sometime before Labor Day, and he was still persistent and wanted to withdraw his plea and asked me to put the motion papers in which I did, and that is the present status of the case at this time, your Honor.

THE COURT: Okay.

Is there anything further you want to say, Mr. Bavanzino?

MR. BAVANZINO: No, Your Honor.

THE COURT: The application to withdraw the plea is in all respects denied.

Arraign the defendant for sentence.

Take the gag off him.

[24] The record will note that when the defendant saw fit to make a comment, he removed the gag himself and made the comment.

THE DEFENDANT: You can go ahead and sentence me, you racious motherfucker.

THE CLERK: What is your name?

THE DEFENDANT: You kiss my motherfucking ass. You are a prejudice motherfucker. You had me pick a Jury before we had a Wade Hearing.

You got it right. I copped out. I am not scared no more. You are a motherfucker sap, and why don't you take the handcuffs off.

You are a sissy fucker.

THE COURT: You want handcuffs off?

Captain, leave the cuffs on for his own protection.

The record will show that the defendant is sitting on the table with his back to the Court.

THE DEFENDANT: The courtroom is not mine. He is going—

THE COURT: Put the gag back on him because I cannot relate into the record my sentence [25] while he is yelling and screaming.

THE DEFENDANT: I am not going to talk no more. I am going to keep the back towards you.

THE COURT: Just as long as you keep your mouth shut and you don't interrupt the Court, that is all right.

It is the sentence of this Court that the defendant, after looking at his record and—

THE DEFENDANT: Did you read the probation report, Mr. Held, I told the People at the Probation Department I was not guilty, and I told them why.

Did you read the probation report?

THE COURT: I thought you told me you were not going to interrupt me.

If you don't keep quiet, I am going to put the gag back on you.

THE DEFENDANT: You are a motherfucker.

THE COURT: Put the gag back on him again.

Handcuff his hands to the chair so he does not remove the gag from his mouth.

The record will show that he is now gagged [26] and bound to the chair and thus he will not interrupt the Court.

Once again, Mr. Bavanzino, I apologize for the necessity of this. It is quite distasteful for everyone, especially the Court and you.

Your client is very distasteful.

I have read over the probation report. The defendant is twenty-four years old, and he has been known to the Children's Court for juvenile delinquency in 1965. His mother complained to the Juvenile Court. The defendant had been away from home on two occasions for drinking alcoholic beverages and associated with undesireables, and then later in 1965, he was convicted of juvenile delinquency, Assault with a knife. He stabbed a fourteen year old, sending a boy to the hospital. He was put on probation. Then he was sent to Warwick.

Then he was paroled, and sent back to Lodisville (phonetic). Then he was paroled, and then he was sent to New Hampton. Then he was paroled, and ultimately in 1969, he was discharged, [27] unfortunately not favorably.

His adult record again as soon as he was discharged practically, seven months thereafter, some Judge saw fit to give him a Y.U. for Attempted Grand Larceny, automobile, and Burglary Tools in Brooklyn Criminal Court, and in 1971, he was convicted of Robbery, Grand Larceny in the Third Degree in the Supreme Court.

He robbed another person of fifty-three dollars with a knife.

He is a second felony offender.

Robbery in the Third Degree was sentenced by Judge Corso on January 26, 1972.

At the time of his arrest on this case, he was on parole and declared delinquent due to re-arrest. Indictment 431 of 1975 was consolidated into the present offense for purposes of a plea; and sentenced under inductment 431 of 1975, the defendant was charged with Robbery in the First Degree, two counts of Robbery in the Second Degree, Petit Larceny and Criminal Possession of a Weapon in the Second Degree.

[28] In that offense the defendant and the co-defendant on January 20, 1975, at gunpoint forcibly stole eighty-five dollars from the candy store owner and when both defendants were apprehended, the co-defendant, Anderson, possessed a loaded revolver and Ramsey a knife.

The defendant says that he denies his guilt in 431 of 1975, and he states that according to the probation report he met his co-defendant in the street and together they got a taxicab headed in the direction of a pool room at Washington Avenue near St. Marks.

The defendant states he does not know how his co-defendant had a revolver in his possession, and denies having the weapon himself.

The defendant said he admitted his guilt in the present offense to the Assistant District Attorney because he was beat up by the arresting officer.

The defendant advises that he accepted the plea for the purposes of his own convenience as well as he feared conviction if he were found [29] guilty at trial.

The defendant has undergone psychiatric examination in connection with the present offense and the consolidated indictment. At one point he was found unfit to proceed,

and was admitted to Mid-Hudson Psychiatric Center where he was a patient from April until June of 1975.

The psychiatrist at the Mid-Hudson Psychiatric Center diagnosed the defendant as an anti-social person, but no medication.

The defendant was found fit to proceed on July 11, 1975, and July 16, 1975, respectively.

The defendant—I am reading from the report—also the defendant advises that he withdrew his plea because he was not guilty and had only pleaded guilty on the advise of his lawyer, and was tired of being in jail.

The defendant advises he intends to take both cases to trial, but changed his mind and took a plea because he states your Honor's decision at a Wade Hearing was prejudicial. I might state parenthetically I never reached a point of making [30] a Wade decision.

Is that correct, Mr. Bavanzino?

MR. BAVANZINO: That is correct.

THE COURT: I never made findings of facts and conclusions of law and never denied the motion.

It also states the defendant feels that your Honor was prejudicing the Jury during the time of selection. I would state that at the time the appeal is taken from sentence, a copy of the voir dire should be ordered so that the Appellant Court will see whether or not that is the case.

The defendant states he was not able to change Judges. That is a fact. He was afraid of being sentenced to the maximum time and found guilty by the Jury.

The defendant states that your Honor made a promise of six to twelve years which he feels is highly excessive, especially so because his co-defendant in indictment 431 of 1975 was sentenced to two to four years.

The defendant states three and a half to [31] seven years would be acceptable to him and he is considering to withdraw his plea if your Honor follows through with the promise of six to twelve.

There is one other thing I want to read from the report, at the interview the defendant was generally cooperative and quite talkative, especially so in derogating

the Criminal Justice System of which he feels he is made victim of.

So he seems with people that he has held up at gunpoint and knifepoint and all the other things he has done, they weren't victims, he was the victim.

It is an interesting attitude. The defendant shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive.

Unfortunately, it appears quite obvious that at least at this juncture unfortunately that he is not going to be reformed. He is only going to become punished.

[32] It is the sentence of this Court that the defendant be sentenced to a minimum of six years and a maximum of twelve years in the New York State Department of Correctional Services to commence after the service of thirty days heretofore imposed for Criminal Contempt of Court by the contemptuous obnoxious nauseating conduct and language that the defendant displayed in this courtroom.

Take him away.

THE CLERK: The defendant is advised he may appeal from the sentence just imposed upon him by filing a Notice of Appeal in duplicate with the Clerk of this Court within thirty days of this date, and a copy must be sent to the District Attorney of Kings County.

If he cannot afford counsel for this purpose, he may apply to the Appellate Division, Second Department, for such counsel to be assigned.

Remand the defendant.

THE DEFENDANT: You are a sap, Held, you are a faggot.

At a Criminal Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Civic Center and Montague Street, Brooklyn, New York, on the 14th day of October, 1976.

PRESENT:

HON. Gerald S. Held
Justice.

Indictment No. 2588/75 & 431/75

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

HAROLD RAMSEY, DEFENDANT

MOTION TO WITHDRAW PLEAS OF GUILTY

Submitted 9/29/76

John B. Avanzino
For the Motion

Eugene Gold, D.A.,
Kings County
In opposition

Papers Numbered
1, 2, 3

The following papers, numbered 1 to 3
submitted on this motion:

Notice of Motion and Affidavits and Affirmations

ORDER OF HONORABLE GERALD S. HELD DENYING PETITIONER'S MOTION TO WITHDRAW THE PLEA, ENTERED OCTOBER 14, 1976

Upon the foregoing papers, the hearing—argument—held herein, and opinion of the Court herein, it is

ORDERED, that the motion to withdraw pleas of guilty be and the same hereby is denied

ENTER

_____

J.S.C.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County

HON. JAMES D. HOPKINS, Justice Presiding
HON. VITO J. TITONE,)
HON. JOSEPH A. SUOZZI,)
HON. CHARLES MARGETT,) *Associate Justices*

2588-75

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

HAROLD RAMSEY, APPELLANT

ORDER AFFIRMING JUDGMENT OF CORRECTION—February 6, 1978

In the above entitled action, the above named Harold Ramsey, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, entered September 17, 1976; and the said appeal having been submitted by Steven W. Fisher, Esq., of counsel for the appellant, and submitted by Laurie Stein Hershey, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVIN N. SELKIN
Clerk of the Appellate Division

STATE OF NEW YORK
COURT OF APPEALS

2588-75

BEFORE:

HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

HAROLD RAMSEY, DEFENDANT-APPELLANT

CERTIFICATE DENYING LEAVE TO APPEAL—March 17, 1978

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
March 17, 1978

/s/ Charles D. Breitel
Chief Judge

Steven W. Fisher, Esq.
16 Court Street
Brooklyn, New York 11241

Hon. Eugene Gold
District Attorney, Kings County
Municipal Bldg.
Brooklyn, New York 11201
Clerk, Court of Appeals

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* Description of Order: 2-6-78 App Div 2 affmd. 9-17-76 Sup. Ct., Kings Co.

STATEMENT

The material that follows was not before the Appellate Division when it considered the petitioner's case below. However, it was available to the Court upon its request or upon the request of counsel for either side. No such request was ever made.

With the exception of the minutes of the *Wade* hearing, all of the material was before Justice Held when sentence was pronounced. The *Wade* hearing was conducted by Justice Held one day before he accepted the petitioner's plea of guilty.

The material in its entirety is included in this Appendix at the specific request of the respondent.

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

Indictment No. 431/75

[Filed January 28, 1975]

THE PEOPLE OF THE STATE OF NEW YORK

against

XJ. ERNEST ANDERSON
XJ. HAROLD RAMSEY, DEFENDANT

COUNTS

ROBBERY IN THE FIRST DEGREE
(2 counts);

ROBBERY IN THE SECOND DEGREE;

PETIT LARCENY;

CRIMINAL POSSESSION OF A WEAPON
IN THE SECOND DEGREE

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about January 20, 1975, in the County of Kings, forcibly stole certain property from BOBBY LAWRENCE to wit: a quantity of United States Currency and in the course of the commission of the crime and of immediate flight therefrom the defendants used and threatened the immediate use of a dangerous instrument.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about January 20, 1975, in the County of Kings, forcibly stole certain property from BOBBY LAWRENCE to wit: a quantity of United States Currency and in the course of the commission of the crime and of immediate flight therefrom, the defendants displayed what appeared to be a pistol, revolver or other firearm.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of ROBBERY IN THE SECOND DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about January 20, 1975, in the County of Kings, forcibly stole certain property from BOBBY LAWRENCE to wit: a quantity of United States Currency.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of PETIT LARCENY, committed as follows:

The defendants, each aiding the other and being actually present, on or about January 20, 1975, in the County of Kings, stole certain property from BOBBY LAWRENCE to wit: a quantity of United States Currency.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE, committed as follows:

The defendant, on or about January 20, 1975, in the County of Kings, knowingly and unlawfully possessed a loaded firearm, to wit: a revolver with intent to use the same unlawfully against another.

EUGENE GOLD
District Attorney

SUPREME COURT
KINGS COUNTY
CRIMINAL TERM
PART IA

(Ind. 431/75)

THE PEOPLE OF THE STATE OF NEW YORK

against

HAROLD RAMSEY, DEFENDANT

MINUTES OF PLEA—September 8, 1975

Brooklyn, N.Y.

Before:

Hon. Larry M. Vetrano,
Justice

Appearances:

N. Silverman, Esq., ADA
For the People

E. Quinn, Jr., Esq.
For the Defendant

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[2] THE COURT: This is Mr. Ramsey.

MR. QUINN: For identification purposes, this defendant is Harold Ramsey. Your Honor, it is my understanding that there is a report from Part I that has to be confirmed on the other indictment. The representative from the DA's office—

THE COURT: Is it on this case or another case?

MR. QUINN: On the second case; that on which we are considering a consolidation. The defendant informs me he wishes to withdraw and confirm the report.

THE COURT: Let's take the plea in the meantime.

MR. SILVERMAN: Your Honor, on this case, I understand that the report was confirmed in Part I on

February 28, 1975—I beg your pardon. It is on the other case.

THE COURT: Make your offer, counsel.

MR. SILVERMAN: If your Honor pleases, at this time I would move to consolidate Indictment 2588/75 into Indictment 431/75, both said indictments against Harold Ramsey.

THE COURT: Is that on consent?

MR. QUINN: On consent, your Honor.

THE COURT: Mr. Ramsey, you were examined on [3] July 7th and July 11th by Drs. Weidenbacher and Goldman respectively. They certify that you do not as a result of mental disease or defect lack capacity to understand the proceedings against you and to assist in your defense.

On this finding, you have a right if you wish to contest it and to a hearing. That hearing would be without a jury. Or you may accept the finding of these two doctors. Will you please talk with your attorney, who stands beside you at this time, and tell me what you wish to do.

THE DEFENDANT: Confirm the finding.

THE COURT: There being no opposition, the report is confirmed. That's on Indictment 431/75. Do you have an application at this time, counsellor?

MR. QUINN: Yes, your Honor. After a conference at the Bench and after speaking to the defendant, he wishes to enter a plea to robbery two, a C felony, based on the conference.

MR. SILVERMAN: I recommend the acceptance of the plea, your Honor.

BY THE COURT:

Q Mr. Ramsey, you have heard your attorney, who stands beside you, indicate to this Court that you wish [4] to withdraw your plea of not guilty to consolidated Indictment 431/75 and in place thereof you wish to interpose a plea of guilty to robbery in the second degree, a C felony. Is that what you want to do?

A Yes, sir.

Q You understand that in pleading guilty, you give up a right that you have at this time to a trial, either with a jury or without a jury.

A Yes, sir.

Q When you plead guilty, in effect you say, "I committed this crime and I do not wish any trial at all." Is that what you want to do?

A Yes, sir.

Q Are you doing it voluntarily?

A Yes.

Q Anybody force you to plead guilty?

A No.

Q What you are pleading guilty to is the third count of the indictment, which is that on or about January 20, 1975, being aided by your co-defendant, Ernest Anderson, who was actually present, you forcibly stole from Bobby Lawrence some money. Is that what you did?

A Yes.

Q This took place at about 9:45 p.m. on January [5] 20, 1975, in a candy store at 849 St. John's Place, in Brooklyn.

A Yes, sir.

THE COURT: I have discussed this case with your lawyer; and subject to reading a probation report, Mr. Ramsey, I have indicated that I am going to consider imposing a minimum sentence of three and a half and a maximum sentence of seven years.

If after reading the probation report I find that I am not inclined to go along with the commitment that I have just made to you, I shall advise you of that fact. You may then consult with your lawyer and withdraw your plea and go to trial, if that's what you want to do. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Ramsey, is it true that the only promises made to you with regard to this case are those promises that have been put on the record by me today?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will accept the plea. The defendant is continued in remand under the same bail conditions for sentence on November 6, 1975.

[6] THE CLERK: What is your name?

THE DEFENDANT: Harold Ramsey.

THE CLERK: Is Mr. Quinn, who stands beside you, your attorney?

THE DEFENDANT: Yes.

THE CLERK: Harold Ramsey, before accepting your plea of guilty, you are advised that if you have previously been convicted of a felony, as defined in Section 70.06 of the Penal Law, that fact may be established after your plea of guilty in this action now before the Court and you will be subject to different or additional punishment.

Harold Ramsey, in the presence of your attorney and pursuant to the stipulations made to you by the Court with regard to sentence, do you now wish to withdraw your plea of not guilty heretofore entered to the consolidated Indictment 431/75 and do you now plead guilty to the crime of robbery in the second degree, a Class C felony, in full satisfaction of that consolidated indictment? Is that what you wish to do?

THE DEFENDANT: Yes, sir.

THE CLERK: Sentence date is November 6, 1975. The defendant is continued in remand under the same bail conditions pending sentence.

PETITIONER'S OFFICIAL ARREST AND DISPOSITION RECORD

[1]

DATE 01-30-75
TIME 1500
FAX NO K2858
RUN NO 9771
CONFIDENTIAL - TO: -- NYCPD HDQ

STATE OF NEW YORK
DIVISION OF CRIMINAL JUSTICE SERVICES
ALBANY, NEW YORK 12203

TRANS NO 26351K
PAGE 1
B ## B774643
DOB 04-03-52
RAC NEGRO
SEX MALE
HGT 5-08
SOC 097-44-8165
FBI 223423H

NAME RAMSEY,HAROLD | NYSID 3010973N

INCORRECT OR INVALID NYSIIS NO. ON INPUT DOCUMENT 3010973

NAMES USED BY SUBJECT

RAMSEY,HAROLD

< < < < < < < CRIMINAL HISTORY > > > > > > >

ARREST DATE INFORMATION	ARREST CHARGES	DISPOSITION AND CORRECTIONS DATA
ARREST DATE/PLACE OCT 22,1969 KINGS COUNTY CRIME DATE/PLACE OCT 22,1969 KINGS COUNTY ARREST AGENCY/ID NO NYCPD PCT 071 B774643	140.35 PL CLASS A MISD POSSESSION OF BURGLAR TOOLS 155.35 PL CLASS D FEL -ATT GR LAR AUTO: VALUE OVER $1500	<DISPOSITION> INITIAL REPORT OF INDT/DKT NO CRIM CRT KINGS DKT/IND# 0013763
ARREST DATE/PLACE FEB 4,1970 KINGS COUNTY CRIME DATE/PLACE UNKNOWN UNKNOWN ARREST AGENCY/ID NO NYCPD PCT 071 B774643	160.05 PL CLASS D FEL ROBBERY-3RD	
ARREST DATE/PLACE FEB 11,1971 KINGS COUNTY	160.15 PL CLASS B FEL ROB:FORCBLE THEFT W/USE-INSTRM	<DISPOSITION> 160.15 PL CLASS B FEL ROBBERY-1ST

PETITIONER'S OFFICIAL ARREST AND DISPOSITION RECORD (CONT'D)

[2]

CRIME DATE/PLACE FEB 11,1971 KINGS COUNTY ARREST AGENCY/ID NO NYCPD PCT 088 B774643		CONSOL WITH ANOTHER PROCEEDING SUP CRT KINGS CO 01-03-72 DKT/IND# 4064/71 <DISPOSITION> 155.30 PL CLASS E FEL GRAND LARCENY-3RD CONSOL WITH ANOTHER PROCEEDING SUP CRT KINGS CO 01-03-72 DKT/IND# 4064/71
ARREST DATE/PLACE APR 17,1971 KINGS COUNTY CRIME DATE/PLACE APR 17,1971 KINGS COUNTY ARREST AGENCY/ID NO NYCPD PCT 079 B774643	220.05 PL CLASS A MISD POSSESSION DANGEROUS DRUG- 6TH 265.05 PL CLASS A MISD DANG INST/INT USE ILL 1ST OFF 160.15 PL CLASS B FEL -ATT ROB:FORCBLE THEFT W/USE-INSTRM	<DISPOSITION> 265.05 PL CLASS A MISD POSSESS DANGEROUS WEAPON-MISD NOT ARRAIGNED ON THIS CHARGE CRIM CRT KINGS 04-21-71 DKT/IND# A009881 <DISPOSITION> 220.05 PL CLASS A MISD POSSESSION DANGEROUS DRUG- 6TH NOT ARRAIGNED ON THIS CHARGE CRIM CRT KINGS 04-21-71 DKT/IND# K009881 <DISPOSITION> 110.00 PL CLASS C FEL ATTEMPT AT CLASS B FELONY 110.00 PL CLASS A MISD ATTEMPT AT CLASS E FELONY -COMBINED- 220.05 PL CLASS A MISD POSSESSION DANGEROUS DRUG- 6TH -COMBINED- CONV PLEA GUILTY ABOVE OFFENSE

PETITIONER'S OFFICIAL ARREST AND DISPOSITION RECORD (CONT'D)

[3]

	SUP CRT KINGS CO COMB CH 01-03-72 DKT/IND# 3115/7 SENT:REFORMATORY TERM INST NOT SPECIFIED < CORRECTION DATA > 4 YEARS ELMIRA RECPTN CEN 02-17-72 INMATE ID 41907 NEW COURT COMM. NOT ON PAROLE 07-02-74 INST. RELEASE GREAT MEADOW COR FC IDGM2963 CONDITIONAL RELEASE
ARREST DATE/PLACE JAN 20.1975 KINGS COUNTY CRIME DATE/PLACE JAN 20.1975 KINGS COUNTY ARREST AGENCY/ID NO NYCPD PCT 077 07703323 COURT CONTROL NO 1782444L FAX NO K01991	160.15 PL CLASS B FEL ROB:FORCBLE THEFT W/DEDLY WEAP NCIC 1299 265.01 PL CLASS A MISD CPIM POSS WEAP - 4TH DEG NCIC 5212 205.30 PL CLASS A MISD RESISTING ARREST NCIC 4801 165.40 PL CLASS A MISD POSSESSION STOLEN PROPERTY-3RD NCIC 2804
ARREST DATE/PLACE JAN 30.1975 KINGS COUNTY CRIME DATE/PLACE DEC 30.1974 KINGS COUNTY ARREST AGENCY/ID NO NYCPD PCT 054	160.15 PL CLASS B FEL ROB:FORCBLE THEFT W/DEDLY WEAP NCIC 1201 160.15 PL CLASS B FEL ROB:FORCBLE THEFT W/DEDLY WEAP NCIC 1201 265.01 PL CLASS A MISD

PETITIONER'S OFFICIAL ARREST AND DISPOSITION RECORD (CONT'D)

[4]

08404812	CRIM POSS WEAP W/INT TO USE NCIC 5299
COURT CONTROL NO 1632229M	
FAX NO K2858	

< < < < < < < OTHER INFORMATION > > > > > > >

ACTIVITY	DATE	COMMENTS		
NST ADM	JAN 17,1969	DACC EDGECOMB CIVIL NARCOTICS CERTIFICATION	SENTENCE LENGTH NOT REPORTED INMATE ID 5002700	
NST ADM	JAN 17,1969	DACC SHERIDAN CIVIL NARCOTICS CERTIFICATION	SENTENCE LENGTH NOT REPORTED INMATE ID 5002700	
SOC SEC NO		097-44-6185 FREQ 01		
[redacted]	APR 3,1952	FREQ 08	BKLYN	NEW YORK FREQ 06
BIRTH DT/PL	APR 3,1947	FREQ 01	BROOKLYN	NEW YORK FREQ 02
			NYC	NEW YORK FREQ 01
NAMES AND ADDRESSES	JAN 17,1969	RAMSEY,HAROLD		
		435 GRAND AVE	BKLYN	NEW YORK
	JAN 17,1969	1040 CARROL ST	BKLYN	NEW YORK
	OCT 22,1969	RAMSEY,HAROLD		
	FEB 4,1970	RAMSEY,HAROLD		
		1040 CARROLL	BKLYN	NEW YORK
	FEB 11,1971	RAMSEY,HAROLD		
	APR 17,1971	RAMSEY,HAROLD		
		1040 CARROLL ST	BROOKLYN	NEW YORK
	FEB 17,1972	RAMSEY,HAROLD		
	JULY 2,1974	RAMSEY,HAROLD		
	JAN 20,1975	RAMSEY,HAROLD		
	JAN 30,1975	RAMSEY,HAROLD		
		1040 CARROLL ST	BKLYN	NEW YORK

THE ABOVE RESPONSE TO YOUR INQUIRY IS BASED ON A FINGERPRINT IDENTIFICATION AND CONTAINS ALL INFORMATION IN OUR FILES TO WHICH YOU ARE ENTITLED

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM
PART 52

Ind. No. 2588/75

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HAROLD RAMSEY, DEFENDANT

MINUTES OF *WADE* HEARING—August 3, 1976

Supreme Court House
Brooklyn, N.Y.

Before:

HON. GERALD S. HELD

Appearances:

FOR THE PEOPLE

EUGENE GOLD, ESQ.
By: JOHN W. HESTER, ESQ.
Assistant District Attorney

FOR THE DEFENDANT

JOHN AVANZINO, ESQ.
25 Plaza Street
Brooklyn, N.Y.

[2] REBECCA WALKER, residing at 552 East 56th Street, Brooklyn, New York, 11203, having been called as a witness and duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION OF MISS WALKER

BY MR. HESTER:

Q Miss Walker, I draw your attention to the date of December 30, 1974. Where were you at approximately 8:00 P.M. or 8:30 on that date?

A I was in the beauty parlor at 776 Franklin Avenue.

Q In what county is that located?

A Kings.

Q What were you doing in the beauty parlor at that time?

A I was assisting my sister Monica Faide.

THE COURT: You were working there?

THE WITNESS: Yes, at that particular day.

Q Besides yourself, how many other individuals were present in the beauty parlor at that time?

A It was about seven there, about.

Q Were those both customers and employees?

A Yes.

Q Was Coreen Mundy (phonetic spelling) one of [3] the individuals who was present there?

A Yes. Coreen Mundy was a customer.

Q At approximately 8:20 P.M. did something occur?

A Yes.

Q Would you describe what happened?

A Yes. On that day, while, all I can say, it happened so fast. This man, I found out his name afterwards—

Q What did you find out his name to be?

A Harold Ramsey.

Q What, if anything, did Harold Ramsey do at that time and place?

A He came up and he pulled out a gun.

Q Where did he come from? From where did he come?

A Through the door, the main entrance. Only one entrance.

Q What did he do after entering the store?

A He had this gun. And he said, "No one move." He used some obscene language.

Q Please tell us what he said. We understand that these words are his words and not your own.

A He said, "You see this big mother fucker. Nobody move. I'll blow your brains off. Give me your money. [4] Which he went to every customer and took the money out.

Q From where did he take the money?

A From the pocketbooks. And also, he also came to me and said, "Give me the money." I pulled the drawer out.

Q What drawer is this?

A It's a cash, a little cash drawer. And I pulled the drawer out and I gave him the drawer like it was.

Q What did he do?

A He proceeded—he held the gun in one hand and he used the left hand to take the money out. He took all the money and he put it into his pocket. And he proceeded backways. Took steps backward and he still held the gun and he said, "Nobody move." Again he used the obscene language. And he kept on backway until eventually he went through the door.

Q Do you see Harold Ramsey in court today?

A Yes. That's him right there.

MR. HESTER: Indicating the defendant.

THE COURT: Let me ask you this question. I know that you see Harold Ramsey in court. But the man who you say held up the beauty parlor, held you up, do you see him in court?

THE WITNESS: Yes, sir. I have seen him in [5] the court. Apart from that, about six weeks prior to—

MR. AVANZINO: Objection, your Honor.

THE COURT: Objection is overruled. Just one second. First answer my question and then you will answer any question that the District Attorney wants to put to you.

THE WITNESS: Yes, I see him right there.

THE COURT: The man who held up the beauty parlor on December 30, 1974 at about 8:30 in the evening, do you see him in the courtroom?

THE WITNESS: Yes, sir.

THE COURT: Would you point to that person?

THE WITNESS: He was wearing a black and rust colored shirt.

THE COURT: Indicating the defendant.

THE WITNESS: With the glasses.

THE COURT: Was he wearing glasses at the time of the hold-up?

THE WITNESS: No, he wasn't.

THE COURT: Next question.

MR. HESTER: Thank you, your Honor.

Q Mrs. Walker, would you describe the lighting conditions inside your store at that time?

[6] A Excuse me?

Q Would you describe the lighting conditions inside the store at that time?

A It was much brighter than this.

THE COURT: Brighter than in this courtroom?

THE WITNESS: Yes. And the store was all lighted up with the lights everywhere.

Q How large a store is it?

A It's very long.

Q When you say, "Very long"—

THE COURT: Let's say from that back wall to what point?

THE WITNESS: Longer than in here.

THE COURT: Longer than the length of this courtroom?

THE WITNESS: Yes.

THE COURT: And the length of this courtroom, Mr. Freedman, is how long?

THE CLERK OF THE COURT: Thirty-six feet to the farthest point to that doorway. Thirty-nine feet, nine inches. The witness box to the rear wall, thirty feet.

THE COURT: Something longer than thirty feet.

THE WITNESS: Yes.

[7] THE COURT: How wide is the store, would you say?

THE WITNESS: It's not very wide. It's from here to the wall or might be a little wider.

THE COURT: Mr. Freedman, do you have the measurement from the witness box to the wall, to the right of the witness as she sits in the witness box?

THE CLERK OF THE COURT: Yes, we have that. It is ten feet six inches.

THE COURT: You say just a little bit wider than that?

THE WITNESS: Yes.

Q When you first observed the defendant enter the store, how far were you from the front entrance that he used?

A Excuse me?

Q How far were you from the front entrance at the time that he walked into the store?

A It's a good distance. I was like three-quarters of it. I was more in the back. He was coming.

THE COURT: Did there come a time when the man who held up the store came close to you?

THE WITNESS: Yes. He was right up to me.

[8] THE COURT: How long a time was he right up to you? Was it a second, a minute or longer or less?

THE WITNESS: I would say, about, two seconds. Two to three seconds, thereabouts, to me personally.

THE COURT: Was there a time when he was close to you but not right up to you?

THE WITNESS: Yes.

THE COURT: How long a time was that?

THE WITNESS: I really don't remember. I really don't remember exactly.

THE COURT: Ask questions.

Q How long was he in the store that evening totally?

A I will say, about, five to ten minutes, roughly.

Q During that time, five to ten minute periods, where were you looking?

A I was looking directly at him.

Q Had you ever seen that man before December 30, 1974?

A Yes. I will say, about, six weeks prior to the incident, I saw him in the neighborhood.

MR. AVANZINO: Objection, your Honor.

[9] THE COURT: Objection is overruled.

A (Continuing) I will say, Lincoln Place and Franklin Avenue.

THE COURT: How far away is that from your store?

THE WITNESS: It's not far. Just about, less than fifty yards.

THE COURT: That's one hundred and fifty feet. A yard is three feet. Do you understand that?

THE WITNESS: Yes. But, it's less than that. I have seen him—

THE COURT: What did you see him doing that drew your attention to him?

THE WITNESS: I seen him with a guy that I knew. His name is—well, I know him by Robert. And I didn't really know his name until I think it's the next day.

THE COURT: You didn't really know, whose name are you speaking of? You said, "His name."

THE WITNESS: Harold Ramsey's name.

THE COURT: How did you learn Harold Ramsey's name?

THE WITNESS: By a guy named Roberts.

[10] THE COURT: The next day after the hold-up?

THE WITNESS: Yes, the next day.

THE COURT: How did you learn that? You went over to him and asked him?

THE WITNESS: Yes, I asked Robert. I described him. And Robert said, "Yes," he knows him very well.

THE COURT: What description did you give to Robert in order to obtain the name of this man, the defendant?

THE WITNESS: He was dark skinned.

THE COURT: Yes.

THE WITNESS: And I had seen him.

THE COURT: That's not the only description that you gave, did you? You didn't say, you know that dark skinned fellow? There are an awful lot of dark skinned fellows.

THE WITNESS: I told had seen him.

THE COURT: What description did you give to this gentleman Robert?

THE WITNESS: He was about five seven.

THE COURT: And dark skinned?

THE WITNESS: Dark skinned.

THE COURT: Anything else?

[11] THE WITNESS: I don't really recall. And Robert said to me, "Yes," he knows him, because he was in trouble before. As a matter of fact—

MR. AVANZINO: Objection.

THE COURT: Objection sustained.

THE WITNESS: As a matter of fact—

MR. AVANZINO: Objection.

THE COURT: You can't answer that question. It has nothing to do with this hearing. Next question.

Q When you spoke to Robert the day after this incident, did you tell Robert that you had seen him, Robert was the man who held you up earlier?

A Yes, I did.

Q On that occasion when you saw the man with Robert, was that the only other time that you had seen the man prior to December 30, 1974?

A No, I had seen him before.

Q On how many other occasions?

THE COURT: The man who held you up, beside you having seen him at the beauty parlor when he held you up and the time that you say that you saw him with this fellow Robert, you saw him other times also?

[12] THE WITNESS: No. I just saw him,—

THE COURT: That's the question that the District Attorney asked you.

THE WITNESS: No, I just saw him.

THE COURT: Who is, "Him,"?

THE WITNESS: Harold Ramsey with Robert. Because Robert managed the 801 Club.

THE COURT: Listen to my question. The District Attorney has already ascertained from you that you saw this man at the hold-up. He is the fellow that held you up. That's what you say, is that right?

THE WITNESS: Yes.

THE COURT: And the District Attorney has asked you the question and you have answered that you saw Harold Ramsey, the fellow who held you up, approximately six weeks earlier with this fellow Robert, is that right?

THE WITNESS: Yes.

THE COURT: Was there any other time, in your lifetime, that you saw Harold Ramsey before the hold-up, besides that six week period before? Do you understand my question?

THE WITNESS: Oh, yes, yes.

[13] THE COURT: Was there—

THE WITNESS: Yes. I have seen him recent before the six weeks.

THE COURT: Between the six weeks earlier, but before the hold-up, you had seen Ramsey?

THE WITNESS: Yes.

THE COURT: Where and when, under what circumstances, under what conditions have you seen Ramsey?

THE WITNESS: In the same area, because I am in that area. In the same area.

THE COURT: How many times would you say that you saw Ramsey in the same neighborhood prior to the hold-up?

THE WITNESS: I will say, about two times.

THE COURT: Next question.

MR. HESTER: I have no further questions at this time.

THE COURT: Cross examination. Off the record.

(Whereupon, there was an off the record discussion.)

CROSS EXAMINATION OF MRS. WALKER

BY MR. AVANZINO:

[14] Q Is it Miss or Mrs. Walker?

A Mrs. Walker.

Q You stated that on December the 30th you were working in a beauty parlor, is that correct?

A I was helping my sister at the beauty parlor.

Q Were you employed there?

A No.

Q Were you working there?

A Yes, I worked on and off there.

Q Were you working that day?

A Yes, I was working that day.

Q At about 8:00 or 8:30 on the 30th of December, how many people were in the beauty parlor?

A Approximately, seven.

Q Can you, at this time, state who those people were?

A Excuse me?

Q Can you, at this time, state who those people were?

A Yes.

Q Who were they?

A A few of the names I can remember. Coreen Mundy, Ruth Battle, Jean Cummings. The others I don't really remember.

THE COURT: Was your sister there?

[15] THE WITNESS: At that particular time she was not. She's not even there now. She's ill.

Q Did Coreen Mundy work in the store?

A No, she doesn't.

Q She was a customer.

A Yes.

Q How long had Coreen Mundy been in the store before the defendant supposedly walked in?

A Excuse me, I don't get that.

THE COURT: Before the hold-up, how long had Coreen Mundy been in the store? That's what counsel wants to know.

THE WITNESS: I don't know exactly. I'm sorry, I can't remember.

THE COURT: Was it more than a couple of minutes before?

THE WITNESS: Yes. She was under the dryer.

THE COURT: So, she must have had something done to her hair in order to be under the dryer?

THE WITNESS: Yes.

THE COURT: Usually dryers are used when the hair is made wet?

THE WITNESS: Yes.

Q Was she under the dryer at the time that the [16] defendant supposedly walked into the store?

A Yes, she was under the dryer.

Q How far does that dryer extend over the person's head?

THE COURT: You want to know how far the dryer extended over Coreen Mundy's head?

MR. AVANZINO: Yes, Judge.

A I don't remember how far it extended. As a matter of fact, I wasn't even paying attention to Coreen Mundy. All I know, this man, I found out his name afterwards, Harold Ramsey, came towards the shop. I didn't even see when he came in. He just bust right in.

MR. AVANZINO: Judge, it's not responsive. I object.

THE COURT: Your objection is sustained. Please answer the question.

THE WITNESS: Yes.

Q Now, outside of Coreen Mundy, who else was in the store?

MR. HESTER: Objection.

THE COURT: Objection is sustained.

MR. AVANZINO: I would like to know the names of the other two people.

THE COURT: You want me to have the Court [17] Reporter read it back?

MR. AVANZINO: If your Honor prefers to do it.

THE COURT: I will do it that way this time but I will ask you to pay attention the next time. Read it back.

(Whereupon, the Reporter then read back the requested answer.)

Q Mrs. Walker, who is Ruth Battle, do you know?
A Ruth Battle?
Q Yes.
A Yes, I know her.
Q Was she a customer or did she work in the store?
A She doesn't work in the store. She is a customer.
Q How about Jean Cummings?
A Jean Cummings worked in the store.
Q Worked in the store. Were there any other names that you can remember at this time?
A No, there is no other names. As a matter of fact, there are only two more customers that were there and they happened to be Haitians. They are from Haiti. They are no longer living in Brooklyn.

Q In other words, your present testimony is that [18] altogether aside from you and the three people that you named, there were two others, a total of six in the store, is that correct?

A Roughly. I don't know exactly the numbers that were there. I really don't.

Q Who was in charge of the store that day?
A I worked that day.
Q You were in charge of the store?
A Yes.
Q Did you keep the appointment book?
A I really can't remember.
Q Did you have an appointment book?
A Do I have an appointment book?
Q Did you have one at that time?

THE COURT: He means with regard to customer's appointments in the store.

Q Let me rephrase it another way. Do the customers just walk in from the street or do you have hours by appointment?
A I take hours by appointment.
Q Do you have an appointment book for that day?
A Presently now?
Q No, no.
[19] A Did I then have an appointment book?
Q On that day?
A Yes, I had one. But I don't remember if I used it that particular day.
Q Now, how long before the alleged hold-up, how long a period of time had you seen the defendant Harold Ramsey, how long before? How long before the hold-up in time had you seen Harold Ramsey for the first time?
A I don't understand what you mean. I don't get the question.
Q Before the night of the hold-up.
A Yes.

THE COURT: You want to know when was the last time that she had seen Ramsey before the hold-up or the first time she saw Ramsey before the hold-up?

MR. AVANZINO: The first time she had seen Harold Ramsey before the hold-up.

THE COURT: When was the first time in your lifetime that you saw Harold Ramsey?

THE WITNESS: In between the six weeks period I seen him about two times.

THE COURT: You are not listening to the [20] question. The question is, when is the first time in your lifetime that you saw Harold Ramsey? When was the first time that you ever saw Harold Ramsey? That's what he wants to know.

THE WITNESS: Between the six weeks period with Robert. The two times that I seen him with Robert.

THE COURT: You are not listening to the question. We are not talking about the two times that you saw him after you saw him with Robert. When you saw him with this follow Robert was that the first time that you ever saw him?

THE WITNESS: Yes.

THE COURT: Why don't you answer the question then, madam?

THE WITNESS: I didn't understand the question.

THE COURT: Now, you do, don't you?

THE WITNESS: Yes.

THE COURT: When was the first time that you ever saw Harold Ramsey?

THE WITNESS: With Robert.

THE COURT: Okay, how many days or weeks or months was that before the hold-up, approximately?

[21] THE WITNESS: Six weeks period.

THE COURT: Next question.

Q Where did you first see Harold Ramsey?

A On the corner of 801, that's a club that Robert managed between Lincoln and St. Johns.

Q How far is that in relation to your store?

A It's not far. Just across the street from the store.

Q You say you noticed this Harold Ramsey with Robert?

A Yes, I saw him standing there.

Q How long have you known Robert?

A A while.

Q Can you give us an estimate of time?

A I have known him about—I knowed him between the summer of '74.

Q You say that Robert was the manager of the 801 Club?

A Yes.

Q Had you ever seen Robert standing outside with anybody else?

A Well, yes, a few times.

Q Who were those other people?

A I don't know.

[22] MR. HESTER: Objection.

THE COURT: Objection overruled. She's already answered it.

Q You don't know.

THE COURT: That's what she answer.

Q Is there any special reason why you remember the defendant six weeks before the alleged hold-up and not these other people?

A Well, naturally when he came into the beauty parlor that particular day—I am very good on faces. I recognized the face.

Q Did you speak to Robert between the time that you first saw the defendant Harold Ramsey and the night of the alleged hold-up?

A I know Robert pretty well.

Q Did you speak to him?

A Yes, I did.

Q Did you speak to him concerning the defendant?

A I described the person to Robert.

Q When did you describe the person to Robert?

A About a day after.

Q A day after what?

A The incident.

Q The alleged hold-up?

[23] A Yes.

Q Now, when you first saw the defendant Harold Ramsey, which you claim was from six weeks, approximately six weeks prior to the hold-up, you said that you saw him with Robert, correct? Now, I ask you again, did you speak to Robert at or about that time concerning the person that he was talking to or standing with?

A I spoke with Robert the day after.

MR. AVANZINO: Your Honor, she's not being responsive, Judge.

THE COURT: Repeat the question.
MR. AVANZINO: Reread the question.
THE COURT: No, you repeat it. Rephrase it.
MR. AZANZINO: Very well.
Q You said that you first saw Harold Ramsey, about, approximately, six weeks before the hold-up and you claimed that you saw him in front of the 801 Club in the company of a person named Robert, whom you know, is that correct?
A Yes.
Q When did you first speak to Robert about Harold Ramsey?
A After the incident at the hold-up.
Q Now, the testimony is that you saw the defendant [24] twice in a six week period before the hold-up, is that correct?
A Yes.
Q You saw him both times with Robert?
A I have seen him with Robert?
Q In front of the 801 Club?
A Yes.
Q You never asked Robert who this defendant was or who this gentleman was?
THE COURT: Prior to the hold-up?
Q (Continuing) Prior to the hold-up?
A I seen Harold Ramsey about, roughly two times, I said.
Q Did you ever ask Robert who he was?
A No, I didn't.
Q What attracted your curiosity to the defendant?
A Because I know Robert.
Q Did you ever see Robert stand outside with somebody else?
A I didn't pay attention.
Q Why did you pay attention to this defendant?
A Because I remembered his face.
Q How far away is the Club 801 from your premises?
A Just across the street.
[25] THE COURT: That must be the second or possibly the third time she answered that question of yours. Please, proceed.
MR. AVANZINO: Well, your Honor, she testified—

THE COURT: Please proceed. Next question, Mr. Avanzino.
MR. AVANZINO: I would just like to bring out that she testified it was a hundred and fifty feet. A hundred and fifty feet doesn't constitute across the street.
THE COURT: It all depends how wide the street is.
MR. AVANZINO: Can we go into that?
THE COURT: Ask questions as you see fit. Next question.
Q Where is the Club 801 in relation to the beauty parlor?
A Across the street. It's the opposite side of the street. Franklin Avenue is a one-way. The traffic goes in one direction.
Q What street is your store on?
A My store is on Franklin Avenue.
Q Where is the Club 801, the entrance to that, [26] on what street?
A It's on, I think, I'm not sure. I would say, Lincoln. But, it's in the middle.
THE COURT: It's in the middle of the block?
THE WITNESS: No. The club itself is on the corner of Lincoln Place and Franklin Avenue.
THE COURT: When you saw Robert standing outside with the man that you say is the defendant, where were you standing?
THE WITNESS: Where was I standing?
THE COURT: At the time that you saw him.
THE WITNESS: On one occasion I was driving on the block, coming up Franklin Avenue.
THE COURT: What was the distance separating you from Robert and the defendant at that time?
THE WITNESS: Not much difference.
THE COURT: What was the distance, approximately? Can you indicate to some place in the courtroom, your measurement?
THE WITNESS: I say you are standing in it right now.
THE COURT: How far away would Robert and the defendant be standing in front of the 801 Club?

[27] THE WITNESS: It's not far. Like when I turn, turn a street.

THE COURT: How far is not far? One feet, a hundred feet?

THE WITNESS: I would say, ten.

THE COURT: Okay.

Q Ten feet?

A Twenty or something like that.

Q The second time that you claim that you saw the defendant, how far from the defendant were you at that time?

A It's in the same area. It's in the same vicinity.

Q Ma'am, would you please—

MR. AVANZINO: Your Honor, would you instruct the witness to kindly answer the question?

THE COURT: How far away were you when you saw him the second time? What was the distance separating the two of you, approximately, if you remember?

THE WITNESS: I don't remember. I don't know exactly.

THE COURT: Was it a far distance?

THE WITNESS: No, it's not a far distance. It's near, because everything is right there.

[28] THE COURT: Were you able to see his face?

THE WITNESS: Yes, I know his face.

THE COURT: Were you able to see his face clearly that second time that you saw him?

THE WITNESS: Yes. Twenty years from now I will still remember his face.

THE COURT: The third time that you saw the defendant with Robert—

THE WITNESS: It's all in the same area.

THE COURT: —were you able to see his face clearly at that time?

THE WITNESS: Yes, I saw his face each time.

THE COURT: Proceed.

Q What time of day was it that you saw Harold Ramsey, the first time prior to the hold-up, the first time you ever saw him in your life?

A It's in the morning period. I don't remember exactly what time.

Q Was it in the early morning? Afternoon?

A Not very early.

Q Evening?

A I would normally get out about 10:00 o'clock, thereabouts.

Q Is that the time that you normally go to work?

[29] A Not every day.

Q Was anyone else standing with Robert and the defendant when you saw the defendant?

A No.

Q They were standing alone?

A Yes.

Q Both times that you saw them?

A Yes.

Q Who owns this beauty parlor?

A Who owns the beauty parlor?

Q Yes.

A At that time, my sister.

Q What is your sister's name?

A Monica Faide.

Q The first time that you saw the defendant on the day of the robbery, what time was that, approximately?

A The day of the robbery?

Q Yes.

A Well, it was a little before I finished working. I normally finished between 7:30 and 8:00 o'clock. But, not every day. So, it was about 8:00 o'clock, a quarter after 8:00, something like that.

Q What time do you normally start work?

[30] A Like I said, I have no special time. 10:00 o'clock, roughly. Ten, roughly.

Q During that period of time, about 10:00?

A Roughly.

Q What time did you usually finish? What time did you finish work at or about that time, this period of time that we are discussing now, December of 1974?

A What time did I finish work?

Q Would you finish, yes?

A I don't know exactly. But it was around that time.

Q Well—

A If the robbery took place between 7:30 and 8:00 o'clock, maybe, 8:15, thereabouts.

Q Do you remember the date as being December 30, 1974?

A It was around the holiday season.

Q Let me ask you this. Do you remember the date that you saw Harold Ramsey on the day of the holdup what date that was?

A Do I remember the date?

Q Yes.

A It was round the ending of December.

Q If I tell you that it was December the 30th, would that revive your memory?

[31] A It was. It was December 31st.

Q Pardon me?

A I think it's December 31st.

THE COURT: New Year's Eve?

THE WITNESS: I think New Year's Eve was the Tuesday and that was the Monday.

THE WITNESS: So, it's the day before New Year's Eve?

THE WITNESS: Yes.

THE COURT: New Year's Eve is the 31st.

THE WITNESS: Roughly, yes.

THE COURT: It would be the 30th, correct or incorrect?

THE WITNESS: It was the day before the New Year's.

Q Let me ask you this. What time did you close the store on December 30, 1974?

A I don't remember exactly.

Q December the 30th, 1974, was the day before New Year's Eve, is that right?

A I don't remember exactly.

THE COURT: What time did you close the store on the day of the hold-up, the night of the hold-up, do you remember?

[32] THE WITNESS: Maybe, it was after the police got there.

THE COURT: Next question.

Q Would you have closed the store later because it was a holiday period?

THE COURT: Objection is sustained as to the form. Sua sponte, the District Attorney does not make ob-objection. However, this court cannot sit and listen to things that have nothing to do with this case. Next question. Certainly, notwithin the four walls of a Wade Hearing.

Q Where was your sister at the time of the hold-up?

MR. HESTER: Objection.

THE COURT: Sustained.

Q When did you first see the police on the night of the hold-up, what time?

A Maybe, about, 8:00 o'clock, a little after 8:00, I think.

Q What police did you see, do you remember?

A His name?

Q Yes.

A No, I don't remember his name.

Q How many policemen were there?

[33] MR. HESTER: I will object to that, your Honor.

THE COURT: I will permit it. Do you know how many policemen came to your store?

THE WITNESS: About two, I think.

Q What did you say to the police and what did they say to you?

A I just told them that this man came—

THE COURT: I can't hear you and I am right next to you.

A (Continuing) This man came and hold up the store. He took out a gun. He said, "Nobody move." He used some obscene language. "Give me the money." He took the money from the drawer and he went into the pocketbooks. He held the gun in the right hand and took the money in the left hand. And like I said, he kept on going backwards and he kept on saying, "Nobody move." He repeated again until he was towards the door. Then, he went. His face was towards me all along.

Q How long would you say that he was in the store?

A Roughly, five to ten minutes.

Q Did you have your eye on the defendant at all times that he was in the store?

[34] A At all times.

Q Didn't you state that you opened the cash drawer?
A I didn't open the cash drawer. I took the drawer out.
Q Did you look down when you took the drawer out?
A I looked at him.
Q You looked at him when you took the drawer out?
A Yes.
Q What else happened that night that the police came?
MR. HESTER: Objection.
THE COURT: Objection sustained.
Q Did the police show you a photograph that purportedly was one of Harold Ramsey's?
MR. HESTER: Objection. At what time is counsel speaking?
THE COURT: Fix a time in your question.
Q At the time that they came to the store for the first time?
A No.
Q Did they later show you a picture?
[35] A Who?
Q Did the police later show you a picture purported to be that of Harold Ramsey?
A Not the same police that came to the store.
Q A different policeman?
A Yes.
Q Is that right?
A Yes.
Q He showed you a photograph of Harold Ramsey, is that right?
A Not one. He showed me several.
Q When he first came to the store, did he show you one picture or several pictures?
A Not the same police who came to the sore.
Q The policeman—
THE COURT: Just a moment. There came a time that you saw some photographs?
THE WITNESS: Yes.
THE COURT: Where did that take place?
MR. AVANZINO: If your Honor pleases, that's not the question that I was going to ask.

THE COURT: I want to lay a proper foundation since counsel isn't doing it. Where did this take place?
[36] THE WITNESS: At the store. I found out his name.
THE COURT: Just a moment. Answer my question.
THE WITNESS: At the store.
THE COURT: A policeman came to the store with some photographs, is that right?
THE WITNESS: A detective.
THE COURT: Next question.
Q What policeman came to the store with the detectives, do you remember?
A A detective.
Q A detective, do you remember his name?
A Afterwards, I found out his name.
Q How many photographs did he show you on the first time that he came to your store?
A Several. I don't remember. Maybe, ten, twelve. I don't remember. Several.
Q Are you sure that he didn't show you just one photograph?
A No, he didn't.
Q And later you saw more photographs?
A He did not. He showed me several.
Q Did you ever speak to a Charles T. Grossberger,
[37] MAG Investigation and Security Corporation?
A I don't remember. I don't know who he is. I don't remember.
Q Did you ever speak to any investigator concerning this case?
A I spoke with the D.A.
Q Did you speak with any other people from the District Attorney's office?
A I don't recall. Like who? I don't recall. I found out that some of the people has retired. I don't know.
Q I ask you again, Mrs. Walker, do you remember speaking to an investigator named Charles T. Grossberger?
A I don't remember his name.
Q Did you speak to an investigator concerning this alleged hold-up?

A Not from the District Attorney's office. Another investigator.

THE COURT: He is talking about a private investigator. An investigator hired by the lawyer who represents the defendant. Did you speak to someone like that?

THE WITNESS: No.

Q What day did the policeman first show you [38] photographs of the defendant Harold Ramsey, if you remember?

A This was after—I don't remember exactly if it's two days or a week later. But this is—

Q If I suggest to you the date of January 5th, would that be about right?

A I really don't remember exactly. But, it's after the incident.

Q The first time that you saw photographs or a photograph of Harold Ramsey, you claim it was a couple of days after the alleged hold-up, is that correct?

A A couple of days after?

Q Yes.

A I don't remember exactly how many days after. But I know it was after the incident.

Q Did you ever appear at the Brooklyn Robbery Squad office?

A Where is that, may I ask?

THE COURT: Did you ever go to a police precinct?

Q A police precinct?

A No.

THE COURT: Or a police office?

THE WITNESS: No.

[39] THE COURT: You don't recall?

THE WITNESS: No, I don't recall.

Q Did you ever see pictures of the defendant at a precinct?

A No.

Q You were never showed any photos of this defendant at a precinct?

A No.

Q If I mention the name Detective Schultz to you as being the detective on the case, that showed you the photograph of Harold Ramsey, would that ring a bell?

A Yes. Detective Schultz was the one who was, that showed me the pictures.

Q When did you see Detective Schultz for the first time?

A Some time after, after the incident.

Q Did he come to the beauty parlor, Detective Schultz?

A Yes, he came.

Q Was he with anyone else?

A I don't recall. I know him, he came.

Q What time of day was it?

MR. HESTER: Objection.

THE COURT: Objection is sustained.

[40] Q When he first came to your store to show you the photographs of Harold Ramsey, about what time of day was it?

MR. HESTER: Objection.

THE COURT: The objection was sustained just a few minutes ago to the same question.

Q How many photographs of Harold Ramsey did Detective Schultz show you on that date?

THE COURT: Objection is sustained. Asked and answered.

MR. AVANZINO: Your Honor, not to become argumentative with the court, but I don't believe that I ever asked that, Judge.

THE COURT: You most certainly did. And I tell you what her answer was. Her answer was she was shown several photos at the store and then you pressed her and asked her how many. And she said she doesn't know. Several ten to twelve. Is that your testimony?

THE WITNESS: Yes.

MR. AVANZINO: The last question was, how many photographs of Harold Ramsey did he show, Judge.

THE COURT: Just one second. How many times [41] were you shown photographs? Once?

THE WITNESS: Just once I was shown a lot of photographs.

THE COURT: When you saw the ten to twelve photographs, is that what you are talking about, when you saw

a lot of photographs? Was a picture of Harold Ramsey, one or several pictures in there?

THE WITNESS: I recall just one. He was wearing a suit.

THE COURT: You picked out one photograph and that was of Harold Ramsey, is that what you are saying?

THE WITNESS: Yes.

THE COURT: Was there a time that you were shown other photos of Harold Ramsey?

THE WITNESS: No, just that particular time.

THE COURT: Were you ever shown any other photos of anyone else after that time?

THE WITNESS: No.

THE COURT: So, you were shown these photographs only once?

THE WITNESS: Only once.

THE COURT: Okay.

Q Mrs. Walker, do you remember speaking to a— [42] MR. AVANZINO: Your Honor, I am trying to be as fast as I can.

THE COURT: I didn't say anything.

MR. AVANZINO: The witness is just bowing her head. She is disgusted.

THE WITNESS: I am not bowing my head.

MR. AVANZINO: The rights of my client—

THE COURT: I haven't noticed her bowing her head. Please, ask your question. In apologizing you are wasting time, you are really wasting time. Only in that respect you are wasting time. Proceed.

Q Do you remember speaking to a Mr. Grossberger?

MR. HESTER: Objection.

THE COURT: It's been asked and answered.

Q Do you remember speaking to a Mr. Grossberger concerning appearing at the Brooklyn Robbery Squad office and viewing twenty photos, twenty mug shots?

A I didn't go anywhere to view the photographs. The detective came to the store and that was it.

Q The detective what?

A The detective Schultz, whatever his name is, I don't remember. He came to the store with a lot of photographs and he showed me quite a few. And there was one that I [43] identified, Harold Ramsey. He was wearing a suit at the time.

Q He was wearing a suit in the photo, is that what you testified?

A Yes.

THE COURT: Yes, that's what she testified to. Next question.

Q Mrs. Walker, when was the last time that you saw Robert?

MR. HESTER: Objection.

THE COURT: Objection is sustained.

MR. AVANZINO: I have no further questions at this time.

THE COURT: Any redirect?

MR. HESTER: No, your Honor.

THE COURT: You may step down. Thank you very much. Remain outside subject to the District Attorney's call. Do you have a second witness?

MR. HESTER: Your Honor, I intended to call a second witness. And in reconsidering what her testimony will be, I realize that I do not have to.

THE COURT: Your answer to my question is, no, you don't intend to call a second witness and therefore it's the People's case for the purpose of [44] this motion.

MR. HESTER: Yes, your Honor.

THE COURT: You rest?

MR. HESTER: The People rest.

THE COURT: That's what I want to know. Thank you. The defendant rests or the defendant wishes to call a witness?

MR. AVANZINO: I wish to call a witness. I don't know if I can get him.

THE COURT: Who do you wish to call?

MR. AVANZINO: The investigator.

THE COURT: Tell me what you expect the investigator to testify to?

MR. AVANZINO: To the fact that he spoke to this lady and she told him certain things which were in direct contradiction to what she said on the stand today.

THE COURT: Such as?

MR. AVANZINO: Such as the fact that—

THE COURT: I am asking you to give us an offer of proof. Please Mr. Avanzino, don't show me any reports from an investigator. I am asking you to give me an offer of proof to determine, whether or not, I should continue this hearing.

[45] MR. AVANZINO: I want to show you the offer of proof.

THE COURT: Tell it to me. The record will reveal the words from your mouth not the words written on your report.

MR. AVANZINO: Very well. The report that I have from the MAG Investigation and Security Corporation states that, "Mrs. Rebecca Walker, originally identified Harold Ramsey. The identification procedure was completely improper as outlined in the following sequence of events.

December 30, 1974 at 8:20, robbery. January 5, 1975, Mrs. Walker notifies Detective Schultz, retired, that she saw a perpetrator in the area and that he hangs around the 801 Club. Detective shows her a picture of Ramsey that day. She agrees that he is the one that robbed her. January the 11th, Mrs. Walker appears at the Brooklyn Robbery Squad office, views twenty photos, mug shots. She selects Harold Ramsey's picture from the group as the perpetrator."

I submit, your Honor, that's in direct contravention what this witness said.

THE COURT: Let's assume he came in and [46] took the stand and testified. What does that have to do with the issue as to, whether or not, this lady knew your client prior to the hold-up and saw him at the time of the hold-up as the perpetrator?

MR. AVANZINO: Well, it wouldn't exactly go to that. It would go to her credibility.

THE COURT: We will continue the voir dire. I will give you until tomorrow at 9:30 to get the investigator in.

MR. AVANZINO: I will call him as soon as I get out, your Honor.

THE COURT: You will call him right now because I am going to give you the opportunity in about three seconds to call him.

MR. AVANZINO: Will your Honor let me go now?

THE COURT: Yes, I will.

MR. AVANZINO: May I use your chambers?

THE COURT: Yes, you may. In the interim, let's get our panel in and the sworn jurors in, so we can proceed as soon as Mr. Avanzino comes back.

MR. HESTER: If I can be excused from the courtroom to send the witness home for the day?

[46A] THE COURT: Go ahead.

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CERTIFIED TO BE A TRUE AND CORRECT
TRANSCRIPT OF MINUTES IN THIS CASE

/s/ Lawrence Fields
LAWRENCE FIELDS
Official Court Reporter

ORDER OF HONORABLE JOHN J. DELURY, ENTERED FEBRUARY 3, 1975, DIRECTING AN EXAMINATION OF PETITIONER

At a Criminal Term, Part AP 3 of the Criminal Court, County of Kings, held at the Court House thereof at 120 Schermerhorn Street on the 3 day of Feb., 1975

PRESENT

HON.
Presiding

THE PEOPLE OF THE STATE OF NEW YORK

Against

HAROLD RAMSEY, DEFENDANT

ORDER DIRECTING MENTAL EXAMINATION (CUSTODY)

MENTAL HYGIENE LAW
SECTION 81.19

Docket No. K504354

Charge 160.15

Filed Jan. 29, 1975

The above named defendant, while in custody, or upon appearance before this Court, having made statements, or showed symptoms, that he is a narcotic addict, or it appearing otherwise that he is a narcotic addict, and said defendant not having heretofore been medically examined for narcotic addiction pursuant to law in connection with this proceeding:

NOW, upon reading and filing the statement of arresting officer dated Jan. 29, 1975, and such other statements and information as may be available, and due

deliberation having been had, and it appearing that defendant is required to be examined pursuant to Mental Hygiene Law Section 81.19 it is hereby

ORDERED, that the above named defendant shall be medically examined to determine if he is a narcotic addict as defined in Article 81 of the Mental Hygiene Law, and it is further

ORDERED, that the defendant be taken by the person or persons having lawful custody of the defendant, to Dept. of Correction, a facility designated by the Drug Abuse Control Commission for the conduct of such examination for defendants in custody, and it is further

ORDERED, that a copy of this order be transmitted forthwith to the examining facility, to the defendant and to the person or persons having lawful custody of said defendant, and it is further

ORDERED, that a report of said medical examination shall be transmitted in triplicate to this Court within 10 days of the signing of this order.

ENTER

/s/ J.J.D.
JOHN J. DELURY

EXAMINATION REPORT,
DATED FEBRUARY 13, 1975,
FILED PURSUANT TO ORDER OF
HONORABLE JOHN J. DELURY

HEALTH AND HOSPITALS CORPORATION
KINGS COUNTY HOSPITAL CENTER
Clarkson Avenue, Brooklyn, N.Y. 11203

EXAMINATION REPORT

(Psychiatric examination, C.P.L. Article 730)

STATE OF NEW YORK
CRIMINAL COURT
COUNTY OF KINGS
PART AP-3

THE PEOPLE OF THE STATE OF NEW YORK

vs.

HAROLD RAMSEY, DEFENDANT

Docket No. K504354

Indictment No.

Information No.

Charge Robbery 1
(B Felony)
in violation of § 160.15 PL

We, the undersigned, each duly certified pursuant to law as a qualified psychiatrist, having been designated by Seymour Gers, M.D., Director of Kings County Hospital Center, pursuant to an order signed by Hon. JOHN J. DELURY (Judge) of the Criminal Court, Kings County, dated 2/3/75 to examine the above named defendant, pursuant to Article 730 of the Criminal Procedure Law, to determine if the defendant is an incapacitated defendant, have conducted such examination with

due care and diligence and have come to the following opinion as a result of such examination.

It is the opinion of each of us that the above named defendant does not as a result disease or defect lack capacity to understand the proceedings against him or to assist in his defense.

Nature and extent of examination:

See Attached

/s/ Franklin S. Klaf, M.D.
FRANKLIN S. KLAF, M.D.
dated 2/12/75

/s/ R. M. Chaitin, M.D.
RAYMOND M. CHAITIN, M.D.
dated 2/12/75

RE: HAROLD RAMSEY CHART NO. 271218
WARD: G-63 FEBRUARY 13, 1975

This is a 22 year old black male who was sent from Criminal Court Kings on February 4, 1975. At that time he was charged with having on December 30, 1974 at 8:20 P.M. at 776 Franklin Avenue (a Beauty Parlor) committed a robbery and was in possession of a dangerous weapon (a gun).

The patient has had numerous Correctional institutionalizations since he was 12. He has been at Warwick, Otis, New Hampton, Elmira, Comstock and Rikers Island. He denies any psychiatric hospitalizations however he said: "When I was young I went to Jewish Hospital. I never wanted to go to Matteawan or Mid-Hudson when I was in prison because I watched the guys who came back from Matteawan and they looked worse." The patient has had 5 previous arrests for robberies, etc.

The patient appears to be a rather "street wise" individual. He manipulates by looking downward to the floor and said: "I look down at the floor, I am ashamed I hear voices." He stated "since the age of 14 I have used heroin. I would shoot as much as I can get. There was no limit. I used to steal everyday. I used hashish, opium, lots of cocaine, speed, ups and downs. I have even ripped off drug pushers and dealers. I have taken them over for their drugs and money. I always wanted to shoot somebody. I wanted to but I could not find anybody who got me mad enough. I got a gun from a friend of mine. I don't care about shooting anybody. The voices tell me to kill somebody. I have been hearing those voices since I got out of prison from Comstock in July 1974. I don't want to go home. The voices tell me people want to hurt me." When asked how he was ever hurt by people in view of the fact that he has a wish to kill, he just shrugged his shoulders. When questioned further about his insistence to kill, he said: "I hear God's voice. God wants me to kill." He talks to me since I have been home. I am not religious. I don't have no religion."

His mother was interviewed by our social worker who stated that he presented problems since a child and

attended a 600 school. She also said that sometimes his memory lapses and he screams in his sleep. She relates these problems to his father who used to beat her and the children. The examiners are not over impressed by this as a justifiable reason to want to kill. It is felt that this man must be considered extremely dangerous as his line of demarcation between killing and not killing as very flimsy.

The patient was born in Brooklyn on April 3, 1952. He has a sister and stated: "I always wanted to kill my father; he beat my mother, me and my sister. I once shot a person with a gun but I missed. I didn't him him."

This patient by his own admission has had no previous psychiatric hospitalizations. The fact that he appears to be somewhat depressed as he stated: "I look down at the floor because I am ashamed, I hear voices," is an attempt to manpulate the examiners. He has had a lengthy prison history involved in all types of felonious acts. He warns the examiners that he intends to kill and at one time he did shoot a person and missed. As psychiatrists we must give deep consideration to the patient's own words and his own thoughts. We believe that there may be some non incapaciated thought disorder associated with the voices or that it can be an attempt to manipulate the examiners. It is our combined opinion that we feel that this patient is legally competent and that his present behavior is associated with his dislike of incarceration and the likelihood that with all his years in prison he has acquired the correct answers to give the psychiatrists. It is therefore felt that he is aware of his charges which he explained and also is capable of aiding and assisting counsel in his defense. His explanation is some confused type of numbers winning that the complainant was supposed to have made.

DIAGNOSIS: Drug Dependency, muntiple
Unspecified psychosis (mild probably)

RECOMMENDATION: Fit to proceed.

RAYMOND M. CHAITIN, M.D./lb
FRANKLIN S. KLAF, M.D.

HONORABLE GEORGE H. NICOLS' ORDER OF OBSERVATION, DATED MARCH 26, 1975

TEMPORARY ORDER OF OBSERVATION
(C.P.L. Article 730)

STATE OF NEW YORK
SUPREME COURT
COUNTY OF KINGS
PART X1, SPECIAL TERM

Docket No. K-504354/75
Criminal Court, Kings, AP 3

THE PEOPLE OF THE STATE OF NEW YORK

vs

HAROLD RAMSEY, DEFENDANT

The above named defendant, being charged with Robbery 1, (B Felony) in violation of Sec. 160.15 PL such defendant having been examined pursuant to an order of this court by two psychiatric examiners, qualified in accordance with law, an examination report thereon having been made to this court and the District Attorney having been given due notice of such examination report, the court having examined such examination report, a copy of which is hereto attached.

AND a hearing having been held on the 26th day of March, 1975

AND it appearing to my satisfaction that the said defendant as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense,

AND it further appearing that a felony complaint has been filed against the defendant,

NOW, THEREFORE, it is

ORDERED that the above named defendant be committed to the care and custody of the Commissioner of Mental Hygiene for care and treatment in an appropriate institution of the Department of Mental Hygiene to be designated by said Commissioner for a period not to exceed ninety days from the date of this order, and it is further

ORDERED that if the person in charge of the institution in which the defendant is confined determines at any time that the defendant is no longer an incapacitated person, such person shall give notice in writing of such determination to this court and to the District Attorney, and it is further

ORDERED that the defendant, if he be in detention, be continued in detention at Kings County Hosp. Ctr. pending designation of an appropriate institution by the Commissioner of Mental Hygiene, and upon notice by the Commissioner of Mental Hygiene of the designated institution be delivered thereto by

NYC Department of Correction

Dated Mar. 26, 1975

HON. GEORGE H. NICOLS
Justice
Special Court
County of Kings

NOTIFICATION OF FITNESS TO PROCEED
FILED PURSUANT TO ORDER OF
HONORABLE GEORGE H. NICOLS

Notification of Fitness to Proceed
(C.P.L. Article 730)

STATE OF NEW YORK
CRIMINAL COURT AP 3
COUNTY OF KINGS

Docket No. K-504354/74

Information No.

Indictment No.

THE PEOPLE OF THE STATE OF NEW YORK

vs

HAROLD RAMSEY, DEFENDANT

TO: The above-named court

TO: District Attorney, Kings County

You are hereby notified that the above-named defendant, who was committed to the custody of the Commissioner of Mental Hygiene by order of this court, dated March 26, 1975 and thereafter retained in such custody by further order or orders of retention each dated NONE and who is now confined, pursuant to designation of said Commissioner, at Mid-Hudson Psychiatric Center Hospital, of which I am in charge, has been determined by me to be no longer an incapacitated person.

You are hereby requested to direct the Sheriff of your county or your local Department of Correction to take custody of the said defendant in accordance with law.

DATED: June 11, 1975

/s/ Erdogan Tekben, M.D.
ERDOGAN TEKBEN, M.D.
Director
MID-HUDSON PSYCHIATRIC CENTER
Hospital

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYG
CLINICAL SUMMARY
MID-HUDSON PSYCHIATRIC CENTER

Name: Ramsey, Harold
Ident. No.: 127-63-90
Hospital No.: 2285
Sex: Male
Age at Admission: 23
Citizenship: U.S.A.
Date of Admission: 4-2-75
Marital Status: Single
Date of Summary: 6-11-75

SUMMARY

This patient was admitted to Mid-Hudson Psychiatric Center on 4-2-75 from Kings County Criminal Court where he had been indicted for the crime of robbery 1st. He was subsequently examined by Dr. Raymond M. Chaitin and Dr. Franklin S. Klaf, both qualified psychiatrists, of the Kings County Hospital Center who found him to be unfit to proceed. From their examination report it would appear that their conclusion was based on the patient's failure to participate in the psychiatric evaluation.

SUMMARY OF PSYCHIATRIC TREATMENT:

Mental Picture and Attitude on Admission: On admission the patient was for the most part uncommunicative. He reluctantly stated that he was here because he had been sent here by his mother but later admitted that he was here because he was seen by psychiatrists of Kings County Hospital. He likewise initially denied ever being hospitalized and subsequently stated he had previously been hospitalized. His recall was good and he was quick to point out when the examining physician repeated questions

that had already been answered such as age and date of birth. However the patient did not respond or claim that he did not know the answer to most questions. He was however fully cooperative to the physical examination which was unremarkable.

Treatment Program: The patient's treatment program consisted of observation, and milieu therapy.

Patient's Response to Treatment Program: The patient's response to treatment program was good in that he displayed no evidence of any psychiatric illness. His comportment on the ward was appropriate. His cooperation with the psychiatric staff on the other hand left something to be desired.

COURSE OF ILLNESS:

This young man has experienced difficulties apparently at least as far back as age 10. He has had school problems, truancy, fighting, abuse of alcohol, abuse of drugs, and a number of placements and commitments. He was committed to the Warwick Training School for Boys in January 1967. He was subsequently admitted to the Otisville Training School for Boys as a parole violator from Warwick. He has had numerous arrests for such things as possession of burglary tools, grand larceny auto, robbery, forcible theft, possession of dangerous drugs, criminal possession of weapon, resisting arrest, possession of stolen property, and has had two commitments to D.A.C.C. narcotics centers.

On arrival here the patient continued his previous lack of responsiveness that had been noted at the Kings County Hospital Center. He was initially able to deny all of his known past history with a straight face. On 5-7-75 the patient was seen on the ward after transfer to Oak Hall. He was immediately recognized by a number of the staff members who had worked with him while he was at the training schools he previously attended. He smiled and freely admitted to all of this past history at the time. He was told that his records would be assembled and he would be staffed later in the month with a view toward returning to court. He agreed to this. When he was in fact presented to the staffing conference on 5-29-75 the patient was completely mute. He responded to no questions. He was excused.

As stated the patient was seen on 5-29-75 by Dr. Boyar, Dr. Kearney, and Dr. Hermele in the presence of nursing staff, social service staff and ward staff. On the basis of the patient's past history and the picture he has presented at Mid-Hudson it was the consensus of the examining psychiatrists that the patient evidenced no psychiatric illness that would prevent him from being returned to the custody of the Kings County Authorities to proceed in the disposition of his legal charges.

Diagnosis: Anti-Social Personality (301.7)

Condition: Good.

Medications: None.

S. HEREMELE, M.D./rej

HONORABLE LARRY M. VETRANO'S ORDER FOR THE EXAMINATION OF PETITIONER, ENTERED ON JUNE 18, 1975

At a Criminal Term, Part 1A of the Supreme Court of the State of New York held in and for the County of Kings, at the Courthouse located at Civic Center at Montague Street, Brooklyn, New York, on the 18 day of June 1975

PRESENT:

HON. Larry M. Vetrano
JUSTICE

Indictment No. 431/75

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

—against—

HAROLD RAMSEY, DEFENDANT

ORDER FOR EXAMINATION PURSUANT TO THE PROVISIONS OF ARTICLE 730 OF THE CRIMINAL PROCEDURE LAW

The above-named defendant being before the Court charged with Robbery 1

and the Court being of the opinion that said defendant is an incapacitated person as defined in Article 730 of the Criminal Procedure Law,

NOW, on motion of the Court, it is

ORDERED, that the said defendant be examined for the purpose of determining if he is an incapacitated person, and the Court directs that the examination be conducted at the place where the defendant is being held in custody unless the Director shall determine that hospital confinement of the defendant is necessary for an effective examination, in which event the Commissioner

of Corrections is hereby directed to deliver the defendant to a hospital designated by the Director and to hold him in custody therein, under sufficient guard, until the examination is completed, for a period not exceeding thirty (30) days;

and it is further

ORDERED, that the Director notify the defendant's attorney, E. Quinn 470 14th Street Brooklyn N.Y. and the District Attorney of the time and place of said examination, and it is further,

ORDERED, that upon the completion of said examination, reports thereof be submitted by the Director to this Court pursuant to Section 730.20, subd. 5 of the Criminal Procedure Law, and the Clerk of the Court furnish a copy of said report to the attorney for the defendant and to the District Attorney.

ENTER

_____

J.S.C.

EXAMINATION REPORT FILED PURSUANT TO
ORDER OF HONORABLE LARRY M. VETRANO

NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION
KINGS COUNTY HOSPITAL CENTER
Clarkson Avenue, Brooklyn, N.Y. 11203

EXAMINATION REPORT

(Psychiatric examination, C.P.L. Article 730)

STATE OF NEW YORK
SUPREME COURT
COUNTY OF KINGS
PART 1A

Docket No.

Indictment No. 431/75

Information No.

Charge Robbery 1 (B Felony)
in violation of § 160.15 PL

THE PEOPLE OF THE STATE OF NEW YORK

vs

HAROLD RAMSEY, DEFENDANT

We, the undersigned, each duly certified pursuant to law as a qualified psychiatrist, having been designated by Seymour Gers, M.D., Director of Kings County Hospital Center, pursuant to an order signed by Hon. Larry M. Vetrano (Justice) of the Supreme Court, Kings County, dated 6/18/75 to examine the above named defendant, pursuant to Article 730 of the Criminal Procedure Law, to determine if the defendant is an incapacitated defendant, have conducted such examination with due care and diligence and have come to the following opinion as a result of such examination.

It is the opinion of each of us that the above named defendant does not as a result of mental disease or defect lack capacity to understand the proceedings against him or to assist in his defense.

Nature and extent of examination:

See Attached

/s/ Adolph Goldman, M.D.
ADOLPH GOLDMAN, M.D.

dated July 11, 1975

/s/ Richard L. Weidenbacher, M.D.
RICHARD L. WEIDENBACHER, M.D.

dated 7-16-75

RE: HAROLD RAMSEY NO. 277698
WARD: G-63 JULY 11, 1975

This defendant examined at Kings County Hospital after having been returned from Mid Hudson Psychiatric Center has been indicted for two robberies. It is alleged that on 12/30/74 he threatened various persons in a beauty shop, displayed a gun and took money. It is alleged that on January 20, 1975 in concert with another person he threatened persons with a gun in a candy store, and took money.

The court papers indicate that this defendant was returned as no longer incapacitated from Mid Hudson Psychiatric Center on 4/2/75. He had been evaluated in Kings County Hospital subsequent to these offenses on two occasions. He was returned to the court on 2/10/75 as fit to proceed. He was found incapacitated on March 13, 1975 when he verbalized suicidal ideas.

At the present time the defendant seems to be malingering a psychiatric condition. After he had been requested to accompany me to the interviewing room he shook my hand. This seemed to be a gesture of friendliness because at our last meeting at the Supreme Court he had behaved in an extremely menacing manner. He mentioned that he eats and sleeps and his mother visited him since he has been here.

When the questions related to the offense was brought up, the defendant sat in a chair and rocked and mumbled to himself. He made no replies. The interviewer carried on a monologue with him reviewing the charges and many of the statements he had made about himself in the past. After some time he was asked about the CIA. He mentioned the CIA is all around you. Asked about imaginary voices, he said he had been hearing voices since the age of seven. The defendant calmly took a cigarette from a pack and asked verbally for a match.

The nurse on the ward reported that the defendant spontaneously went to her and asked to be examined

about a skin condition. On the ward he is most cooperative and shows no signs of confusion.

The defendant made no references to ideas of suicide today and did not seem to be clinically depressed at all.

DIAGNOSIS: Malingering

DISPOSITION: Fit to proceed

ADOLPH GOLDMAN, M.D./ms

RE: HAROLD RAMSEY CHART NO. 277698
WARD: G-63 JULY 16, 1975

On further examination today, the picture essentially is that of an angry, unhappy, brooding man. His responses to queries were often delayed, and they were generally minimal responses, but these responses were all relevant and coherent. When queried some with regard to the charges against him, he responded impaiently and angrily "I didn't do nothing." He also asked angrily "why do you (psychiatrists) keep asking me what I did (?) (or words to this effect). Asked what plans he might have with regard legal defense, the defendant remained silent. He seemed not to wish to address himself to this question.

On one or two occasions during interview today, he spoke spontaneously, there is no unstable symptoms of emotional or mental disturbance on his part; the manner in which he spoke, as well as words, suggest artifice or affection of illness. Thus: "I was riding a snail and a pigeon kicked my head." This report or complaint is rather advertised than confided to the examiner. The defendant also asked the examiner to "tell him" why the CIA is investigating him.

The defendant speaks of use of heroin and Speed (amphetamines), and there are tracks of both his forearms. He indicates that he was making use of drugs around the time of the reported offenses.

He spoke also of having been disturbed emotionally, in effect, when he was young, and he relates this disturbance to the behavior of his father, who is said to have abused the family. "I ran away . . . he's going to get his." He was sent to Willowbrook State School around 13 years ago, and presumably described as retarded at that time. He does not appear retarded presently. It may be that a diagnosis of retardation was made erroneously, it may also be that the defendant was stigmatized and hurt by placement at Willowbrook.

DIAGNOSIS: Personality disorder, unspecified type, with a history of drug use, including heroin.

RECOMMENDATION: Fit to proceed.

COMMENT: The defendant appears anxious and unhappy at present, but there is no evidence of confusion or psychosis.

RICHARD L. WEIDENBACHER, M.D./lb

PROBATION REPORT, DATED NOVEMBER 5, 1975, SUBMITTED TO HONORABLE LARRY M. VETRANO IN AID OF SENTENCING PETITIONER PURSUANT TO HIS PLEA OF GUILTY TO KINGS COUNTY INDICTMENT NUMBER 431/75

DEPARTMENT OF PROBATION
CITY OF NEW YORK
ADULT COURT SERVICES
KINGS SUPREME COURT
SECOND JUDICIAL DISTRICT

To: Honorable Larry M. Vetrano
Justice—Supreme Court

Re: Recommendation as to Sentence
HAROLD RAMSEY CASE NO. 109696

The defendant and one other (2 to 4 years, SDCS) robbed the proprietor of a candy store at gunpoint. At the time of arrest, the defendant was in posssesion of a knife and his associate was in possession of a gun. Necessary force was used to apprehend the defendant as he resisted arrest. The defendant could not be interviewed as he was unresponsive to all questions. Indictment No. 2588/75 (the defendant robbed the occupants of a beauty salon at gunpoint) has been consolidated into the present indictment.

Ramsey, 23, has two juvenile arrests that resulted in probation and several training school commitments and four prior and one subsequent adult arrests revealing a pattern of armed robbery for which he has received a N.Y.S. Reformatory sentence (he violated parole and was sent back to prison). His custodial adjustment was below average. The defendant has a drug background and was civilly committed to DACC. While he was under DACC supervision he absconded twice and was arrested three times. He was finally discharged while he was serving a reformatory term. The defendant comes from an unfavorable family background. A discipline problem at home and in school, he was placed in a 600 school

before dropping out. The defendant has undergone psychiatric examinations in connection with the present offense and consolidated indictment and, at point, he was found unfit to proceed and was admitted to Mid-Hudson Psychiatric Center, where he stayed from April to June 1975. His last two examinations found him fit to proceed. On July 11, 1975, Doctor Goldman made the following diagnosis: "Malingering". The following is extracted from a psychiatric examination ordered in Brooklyn Criminal Court with connection with the consolidated offense: "We believe that there may be some non-incompacitative thought disorder associated with the voices or that it can be an attempt to manipulate the examiner. It is our combined opinion that we feel that this patient is legally competent and that his present behavior is associated with his dislike of incarceration and the likelihood that with all his years in prison he has acquired the correct answers to give the psychiatrists".

This defendant appears to be a second felony offender and therefore a mandatory prison sentence is in order.

Respectfully submitted,

HERMAN METNETSKY
Supervising Probation Officer

APPROVED: J. P. ADAMO
Branch Chief

ORDER OF HONORABLE LARRY M. VETRANO DIRECTING AN EXAMINATION IN AID OF SENTENCE, ENTERED ON NOVEMBER 7, 1975

At a Criminal Term, Part 1A of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at Civic Center and Montague Street, Brooklyn, New York, on the 7th day of November 1975

PRESENT:

HON. Larry M. Vetrano
JUSTICE.

Indictment No. 431/75

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

—against—

HAROLD RAMSEY, DEFENDANT

EXAMINATION IN AID OF SENTENCE PURSUANT TO SEC. 390.30 C.P.L.

The above-named defendant, Harold Ramsey having been convicted of the offense of Robbery 2 and it appearing to the satisfaction of the Court that a physical or mental examination of the said defendant, prior to sentence, is necessary to aid the court in sentencing said defendant, it is

ORDERED, that the said defendant be examined for this purpose, and the court directs that the examination be:

conducted at the place where the defendant is being held in custody unless the Director shall determine that hospital confinement of the defendant is necessary for an effective examination in which event the Commissioner of Correction is hereby directed to

deliver the defendant to a hospital designated by the Director and to hold him in custody therein, under sufficient guard, until the examination is completed, for a period not exceeding thirty (30) days;

and it is further

ORDERED, that, upon completion of said examination, a report containing findings and conclusions be made to this Court.

ENTER

/s/ Larry M. Vetrano
LARRY M. VETRANO
J.S.C.

EXAMINATION REPORT SUBMITTED,
PURSUANT TO COURT ORDER,
IN AID OF SENTENCE

(Psychiatric examination, C.P.L. Article 730)

STATE OF NEW YORK
SUPREME COURT
COUNTY OF KINGS
PART IA

EXAMINATION IN AID OF SENTENCE
PURSUANT TO SEC. 390.30 CPL

Docket No.

Indictment No. 431/75

Information No.

Charge Robbery 2
in violation of § 160.10 PL

THE PEOPLE OF THE STATE OF NEW YORK

vs

HAROLD RAMSEY, DEFENDANT

We, the undersigned, each duly certified pursuant to law as a qualified psychiatrist, having been designated by Seymour Gers, M.D., Director of Kings County Hospital Center, pursuant ot an order signed by Hon. Vetrano (Justice) of the Superior court, Kings county, dated 11/7/75 to examine the above named defendant, pursuant to Article 730 of the Criminal Procedure Law, to determine if the defendant is an incapacitated defendant, have conducted such examination with due care and diligence and have come to the following opinion as a result of such examination.

It is the opinion of each of us that the above named defendant does not as a result of mental disease or defect lack capacity to understand the proceedings against him or to assist in his defense.

Nature and extent of examination:

(SEE ATTACHED)

RICHARD L. WEIDENBACHER

dated 12-12-75

RE: HAROLD RAMSEY CHART S-2635
DECEMBER 12, 1975

This 23 year old individual has been convicted of Robbery in the Second Degree. He an another person are said to have taken money from a man at gunpoint, on January 20, 1975. He is reported also, singly, to have taken money from two women at gunpoint, on December 30, 1974. Indictments relating to the two offenses were consolidated, and the defendant was charged with Robbery in the First Degree (two counts), Robbery in the Second Degree, and certain lesser offenses. He pled guilty on September 8, 1975 to the charge of which he now stands convicted. Currently, he awaits sentence.

The defendant has run afoul of the law on a number of occasions over a period of some ten years altogether. It is noted that he has been charged with Robbery rereatedly. It is noted further that he was convicted of Attempted Robbery in the First Degree in 1971, and that the instant conviction therefore constitutes his second felony conviction.

The history, in addition to chronic or repeated delinquent and anti-social behavior during adolescence and young adult life, with repeated placement in state training schools, includes drug use, with use of heroin. There is also a history of psychiatric evaluation and treatment, at least in conjunction with legal straits. The defendant underwent psychiatric evaluation at Kings County Hospital in the wake of his arrest in January, 1975, was rated incapacitated, and transferred to Mid-Hudson Psychiatric Center. It seems likely that his apparent incapacity was due rather to negativism or perhaps depression, than to psychosis. He is known to the undersigned psychiatrist by virtue of interview at Kings County Hospital in the wake of his return to court from Mid-Hudson Psychiatric Center. When examined in July, 1975, he appeared anxious and unhappy, but neither confused nor psychotic.

He presents at interview this afternoon as an alert, attentive, and responsive individual, but as a quite angry,

irritable and hostile one. He seems to be in good physical health. All his responses to questions were relevant and coherent, although he was impatient, complained of injustices done him generally, and from time to time spiced his language with epithets. During interview, he asserted that he had hallucinated "one time, when he first went to Mid-Hudson", but there is certainly no evidence of current hallucination. Again, although the picture is one of general disaffection and personality disorder of some magnitude and standing, there is no evidence of delusion. Indeed, the defendant expressed indignation or frustration with regard to the current interview, rather demanding to know why it had been ordered. In this connection, however, he soon came to recall: "I got upset in court", and went on to express dissatisfaction with his attorney and his plea.

He understands his legal straits, and fairly clearly, it is his good comprehension of them which explains his unhappiness. He knows that he pled guilty three months ago to Robbery in the Second Degree, and that a sentence of imprisonment will be forthcoming. "He promised me seven years". He continued: "I'm taking my plea back"; he complained that he had been "railroaded". He gave the examiner to understand that he had committed no crime.

A number of salient data of the personal and family history have been included in the Probation Report, dated October 31, 1975. One notes especially that the defendant's father is said to have been a heavy drinker, abusive, and assaultive. His mother and father separated during his mid-childhood, and the boy was soon beyond his mother's control, apparently. He is said to have run away from home during early adolescence, drunk alcohol, and associated with undesirable companions. Subsequently, he made use of drugs, by his own admission.

Although the intellectual capacity and function of the defendant are probably no better than average or dull-normal, it would appear that social and emotional factors account for the disturbed development of his personality. It is possible that he was affected during child-

hood by subtle brain dysfunction, but no good evidence thereof has been reported. There is no history of seizure disorder.

DIAGNOSIS: Personality Disorder, Unspecified Type, with a History of Drug Use (Multiple, including Heroin).

CONCLUSION: Fit to proceed.

RECOMMENDATION: From a psychiatric point of view, the picture is one of personality disorder of some magnitude and standing; the personality structure of the defendant includes passive-aggressive and anti-social features. It seems clear that this structure has been reared upon a basic if veiled core of frustrated dependent needs, with chronic, inarticulate anxiety and depression. His drug use has both illustrated the difficulty, and complicated his life and that of other persons. He seems an individual of about average or dull-normal intrinsic intelligence. There is no evidence of psychosis.

A period of confinement is recommended by way of sentence. The history and findings during interview argue that the defendant is quite immature socially, and that the outlook must be considered guarded for a while to come: he must be considered dangerous at this juncture. Accordingly, it is urged that his release from prison be deliberate, and not hasty. It is also recommended that every effort be made to educate the defendant further during confinement, and that special attention be accorded vocational training. It may be that self-esteem and true self-sufficiency can be enhanced substantially and tactfully by this means.

/s/ R.L.W.
RICHARD L. WEIDENBACHER, M.D./can

ORDER OF HONORABLE GERALD S. HELD
ADJUDGING PETITIONER
IN CONTEMPT OF COURT

ORDER OF COMMITMENT

CONTEMPT OF COURT

COMMITTED IN PRESENCE OF
GERALD S. HELD
Justice of the Supreme Court
of the State of New York

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS, PART 52

Ind. #2588/75

In the Matter of the Criminal Contempt
—of—
HAROLD RAMSEY

At a session of the Supreme Court of the State of New York, Part 52, held in and for the County of Kings on September 17, 1976, at Supreme Court Building, Civic Center, in the County of Kings, City and State of New York, the above-named person did: defy the dignity and authority of the court by open, blatant and contemptuous conduct, and acted in a disorderly, contemtuous and insolent manner, in that he threatened the court with physical harm, continuously interrupted the court, called the court vile and filthy names, and acted and conducted himself boisterously. The above behavior was committed during the sitting of the court, and in its immediate view and presence, and directly tended to interrupt its proceedings and to impair the respect due to its authority, and defendant is thereby guilty of disorderly, contemptuous and insolent behavior in the immediate view and presence of the court, in that the acts heretofore mentioned directly interrupted the proceed-

ings of the court and tended to impair the respect due the court.

IT IS THEREFORE ORDERED AND ADJUDGED that said HAROLD RAMSEY is guilty of criminal contempt of court committed in the immediate view, hearing and presence of the court; and it is

FURTHER ORDERED, that HAROLD RAMSEY be summarily punished for criminal contempt of court, and it is

FURTHER ORDERED AND ADJUDGED, that said HAROLD RAMSEY be imprisoned in the common jail in the County of Kings for a period of 30 days after commitment.

IN WITNESS WHEREOF, I, GERALD S. HELD, a Justice of the Supreme Court of the State of New York, who presided over the session of the court at which the above-mentioned acts were committed in my immediate view, hearing and presence, have hereunto set my hand, subscribed my name, and caused the seal of the court to be affixed hereunto on this 17th day of September 1976.

/s/ G.S.H.
Justice of the Supreme Court
of the State of New York

[SEAL]

SUPREME COURT OF THE UNITED STATES

No. 77-6540

HAROLD RAMSEY, PETITIONER

v.

NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO the Appellate Division, Supreme Court of the State of New York, Second Judicial Dept.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 10, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 277856 194

In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RICHARD ELLIOT MISCHEL
Assistant District Attorney
of Counsel

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department, to review the judgment of the Supreme Court, Kings County entered on the 17th of September, 1976, convicting him, upon his plea of guilty, of the crime of Robbery in the First Degree and sentencing him thereon to a term of imprisonment of not less than six years and not more than twelve years (Held, J., at plea, hearing and sentence).

OPINIONS BELOW

The Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed without opinion, the judgment of conviction and the order is reported at 61 App. Div. 2d 889, 401 N.Y.S.2d 671 [1978]. On the 17th of March, 1978, leave to appeal to the Court of Appeals was denied by Honorable

Charles D. Breitel, Chief Judge.

No opinion was written by the Supreme Court, Kings County.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257[3].

QUESTION PRESENTED.

Whether, under the circumstances of this case, petitioner's counseled plea of guilty was obtained in violation of due process because the trial judge, through petitioner's attorney, advised him of the range of sentencing alternatives if he proceeded to trial or pleaded guilty.

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Amendment XIV.

STATUTES

N.Y. Penal Law §§70.06, and 70.25 [McKinney's 1975]

STATEMENT OF THE CASE.

HAROLD RAMSEY, petitioner herein, was accused by Kings County Indictment Numbers 431/75 and 2588/75 of the crimes of Robbery in the First Degree and related offenses, it being alleged that on the 20th of January, 1975, and on the 30th of December, 1974, petitioner forcibly stole United States Currency from three persons and in the course of the commission of the crimes and of immediate flight therefrom he used and threatened the immediate use of a firearm. A co-defendant was named in the first indictment; it was alleged in the second indictment that petitioner acted alone.

Petitioner pleaded guilty to Robbery in the Second Degree under Kings County Indictment Number 431/1975 to cover the

charges in that indictment and the charges in Kings County Indictment Number 2588/75, three months after the latter indictment was filed. The court conditionally promised to sentence petitioner to a term of imprisonment of not less than three and one-half years to not more than seven years. On the 19th of December, 1975, petitioner was permitted to withdraw his plea of guilty [Vetrano, J., at plea and plea withdrawal].*

On the 4th of August, 1976, petitioner offered to plead guilty to Kings County Indictment Number 2588/75 after the prosecutor moved the indictment to trial, a jury had been selected and the testimony at the Wade hearing had been concluded.** Petitioner pleaded guilty to Robbery in the First Degree to cover all the charges in Kings County Indictment Numbers 2588/75 and 431/75.

At the taking of the plea, the court fully advised petitioner of each of the constitutional rights he was surrendering by pleading guilty. When asked if he understood, petitioner responded "Yes" on each occasion. The following ensued between the court and petitioner:

> THE COURT: Are you satisfied with the legal services rendered on your behalf by your attorney, John Avanzino?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Has anyone forced you, or threatened you or convinced you, against your will, to take this plea of guilty?
>
> THE DEFENDANT: No.

---

* As a second felony offender, petitioner was subject to a more substantial sentence than a "first offender". Pursuant to New York Penal Law §70.06[3][b] and [4] [McKinney's 1975], the minimum sentence available to petitioner was a term of imprisonment of not less than three years to not more than six years. Apparently, the first judge to consider these cases did not believe that petitioner deserved the minimum sentence.

** United States v. Wade, 388 U.S. 218 [1967]; N.Y. C.P.L. §710.20[5] [McKinney's, 1971].

THE COURT: Are you pleading because you are guilty and because you are voluntarily doing it?

THE DEFENDANT: Yes.

Petitioner also acknowledged the court's conditional promise to sentence him to a term of imprisonment of not less than six years to not more than twelve years. In response to the court's questions, petitioner indicated his understanding of and his agreement with the promise.

A factual basis for the plea was developed in the record. Petitioner admitted his involvement in the incidents which resulted in the two indictments. He also admitted that on the 30th of December, 1974, he acted alone and threatened the use of a firearm. With regard to the January 20th robbery, petitioner admitted that he acted in concert with another person who had a firearm. He knew that his companion was armed and that they were entering the store to commit a robbery.

Petitioner answered "Yes" when asked if his statement was "truthful", and voluntary. At no time during the plea proceeding did petitioner assert his innocence or claim that his plea was induced by the court's alleged threat to impose the maximum sentence.

Petitioner returned to court on the 17th of September, 1976, for sentencing and moved to withdraw his plea of guilty because he was "...mixed up and confused, upset, acting under duress, misguided, and also he is innocent...". As part of his response to the motion, Mr. Justice Held read portions of the plea proceeding into the record which indicated petitioner's understanding of and satisfaction with the proceeding and the disposition of his two indictments. The court concluded the review by asking petitioner if he had lied at the taking of the plea to which he responded, "Yes, I am telling you this. You want to let me talk now?"

At this point, the court's efforts to elicit responses from petitioner became fruitless. He became abusive, accused the court of intimidating his lawyer "...in front of the Jury..."and called the Judge a "gangster". Petitioner vehemently protested his innocence and claimed that,

> [t]he only reason I took my plea is because I was coerced.
>
> You also told my lawyer if I have a trial you will give me twelve to twenty-five years, and he told me that.

After being adjudged in contempt because of his disruptive and obscene behavior, petitioner continued to antagonize the court:

> You ain't sentencing me, man. You ain't brushing me off like Al Capone or some other man. This motherfucker is prejudicial and roughing me off and you don't trust me because you are a sap. You understand this, motherfucker?
>
> You won't let me take my plea back. This motherfucker is not a Judge, he is a dictator. He should have been with Mussolini and Hitler.

Petitioner was gagged and the court continued the inquiry with petitioner's attorney, John Avanzino, Esq.

Mr. Avanzino reminded the court that prior to the Wade hearing he conveyed to his client the original plea offer of Robbery in the Second Degree with a sentence promise of three and one-half years to seven years "...subject, of course, of [sic] [the court] looking at the probation report." The offer was rejected by petitioner and he claimed that he was innocent.

Plea negotiations were re-commenced after the People rested at the Wade hearing. The court offered a plea to Robbery in the First Degree with a sentence promise of "...six to twelve years with the District Attorney's approval." The following

then ensued between the court and petitioner's attorney:

> MR. BAVANZINO [sic]: ... We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at the time I did, Judge. I gave him that warning.
>
> THE COURT: Subject of course of [sic] me reading the probation report. It is a practice in my court when there is an armed robbery, to give a maximum sentence, unless there are mitigating circumstances. [Emphasis supplied].

However, upon learning that this was purportedly the reason that petitioner pleaded guilty, the court inquired further of counsel concerning petitioner's protestations of innocence.

> THE COURT: Are you telling me that you knew when he pleaded guilty, that he was not actually guilty?
>
> MR. BAVANZINO [sic]: I did not know that, your Honor, we can never know anything about a client. We have to go by what the client tells us.
>
> THE COURT: That is exactly the point I am trying to make with you.
>
> When he pleaded guilty, you believed him to be guilty?
>
> MR. BAVANZINO [sic]: I assumed as Your Honor did that he was guilty. I assumed that.

Mr. Justice Held denied petitioner's application to withdraw his plea.

Prior to sentencing him to six to twelve years imprisonment, Mr. Justice Held read into the record petitioner's pre-sentence report which the court had previously reviewed. The report indicated that petitioner, who was then twenty-four years old, had a juvenile delinquency record dating back to 1965. As an adult, petitioner was adjudicated a Youthful Offender for an Attempted Grand Larceny. In 1971, he was convicted of Robbery and Grand

Larceny in the Third Degree. As a parolee and a predicate felon, petitioner committed the crimes which were the subject matter of this plea.

The pre-sentence report listed several reasons given by petitioner for pleading guilty. First, he alleged that he was "beaten up" by the arresting officer. Second, petitioner "accepted the plea for the purposes of his own convenience..." He also feared the imposition of the maximum sentence if convicted after a trial. Third, the court's decision at the Wade hearing was prejudicial. [No decision had been made when the plea was offered]. Fourth, the court prejudiced the jury during their selection.

Petitioner's reasons for wanting to withdraw his plea of guilty were also listed in the pre-sentence report. First, petitioner claimed that he did not commit the crimes charged in the two indictments. Second, he pleaded guilty "...on the advise [sic] of his lawyer, and was tired of being in jail." Third, the sentence promised by the court was excessive "...especially so because his co-defendant in Indictment 431 of 1975 was sentenced to two to four years." However, petitioner stated that "three and a half to seven years would be acceptable to him and he is considering [sic] to withdraw his plea if Your Honor follows through with the promise of six to twelve."

The court noted that petitioner underwent psychiatric examinations "...in connection with..." the two cases, pursuant to N.Y. C.P.L. Art. 730 (McKinney's 1971) and was admitted to Mid-Hudson Psychiatric Center from April, 1975 to June, 1975. He was subsequently found to be a malingerer and fit to proceed in July, 1975.

Mr. Justice Held sentenced petitioner, as promised, to a term of imprisonment of not less than six years to not more than twelve years. The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and leave to appeal to the Court of Appeals has been denied. Petitioner now seeks a writ of certiorari to review the question of whether his counseled plea of guilty was obtained in violation of due process of law.

ARGUMENT

THE COURT BELOW CORRECTLY CONCLUDED THAT PETITIONER'S COUNSELED PLEA OF GUILTY WAS NOT OBTAINED IN VIOLATION OF DUE PROCESS OF LAW BECAUSE THE TRIAL COURT ADVISED HIM OF THE RANGE OF SENTENCING ALTERNATIVES IF HE PROCEEDED TO TRIAL AND WAS FOUND GUILTY OR IF HE PLEADED GUILTY. THERE BEING NO SUBSTANTIAL FEDERAL QUESTION TO BE RESOLVED, CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.

Petitioner's challenge to the validity of his counseled plea of guilty raises the issue of whether, in the abstract, due process is violated whenever a trial judge advises an accused that if he is found guilty after a trial he will receive a sentence in excess of the sentence which would be imposed if he pleaded guilty. Petitioner also asks this Court to define the contours of proper judicial participation in plea bargaining.* While respondent recognizes that some instances of judicial interference may offend due process (see, e.g., Tyler v. Swenson, 427 F.2d 412 [8th Cir. 1970]; Euziere v. United States, 249 F.2d 293 [10th Cir. 1957]; United States v. Tateo, 214 F. Supp. 560 [S.D.N.Y. 1963] [Weinfeld, J.]), the case at bar is not such a case.

The law is well-settled that a plea of guilty which has been coerced is incompatible with due process and must be vacated [see, e.g., Waley v. Johnston, 316 U.S. 101 [1942]; Machibroda v. United States, 368 U.S. 487, 493 [1962]; United States v. Jackson, 390 U.S. 570 [1968]; McCarthy v. United States, 394 U.S. 459, 466 [1969]; and, Brady v. United States, 397 U.S. 742 [1970]). The law is equally well-settled that "...an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial." (Parker v. North Carolina, 397 U.S. 790, 795 [1970]. See, also, United States ex rel. Dean v. Wyrick,

* See, infra at p. 11, n.*

426 F. Supp. 1195 [E.D. Mo. 1976] aff'd, 563 F.2d 1293 [8th Cir. 1977]; Smith v. United States, 427 F. Supp. 20, 23 [E.D.N.Y. 1976], aff'd, 550 F.2d 883 [2d Cir. 1977]). As noted by this Court in North Carolina v. Alford, 400 U.S. 25, 31 [1970]:

> The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant [citations omitted]. That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

(Cf. Bordenkircher v. Hayes, ___ U.S. ___, 98 S. Ct. 663, 667 [1978]).

The voluntariness of petitioner's plea can be determined only by considering all of the relevant circumstances surrounding it [see, e.g., Brady v. United States, supra, 397 U.S. at 749; and Fambo v. Smith, 433 F. Supp. 590, 595 [W.D. N.Y. 1977]), aff'd, 565 F.2d 233 [2d Cir. 1977]. The participation by a trial judge in plea bargaining does not, in and of itself, require setting a guilty plea aside. It is only one factor to be considered in determining whether the plea was voluntary (see, e.g., Toler v. Wyrick, 563 F.2d 372, 373, 374 [8th Cir. 1977]; United States ex rel. Robinson v. Housewright, 525 F.2d 988 [7th Cir. 1975]; Brown v. Peyton, 435 F.2d 1352 [4th Cir. 1970]; United States ex rel. Rosa v. Follette, 395 F.2d 721, 725 [2d Cir. 1968]; and, United States ex rel. McGrath v. LaVallee, 348 F.2d 373 [2d Cir. 1965], cert. den., 383 U.S. 952 [1966].

See, also, United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 315 [2d Cir. 1963] [Friendly, C.J., concurring and dissenting]).*

In the final analysis, the question to be resolved is not so much whether the judge participated in the plea discussions but, rather, what was said and its probable effect (see, United States ex rel. McGrath v. Lavallee supra, 319 F.2d at 315; United States ex rel. Rosa v. Follette, supra, 395 F.2d at 725; United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991-992; and, United States v. Tateo, supra).**

---

* In the federal system, the law is settled that a district judge shall not participate in any plea discussions (see, Fed. Rules Cr. Proc. rule 11(e)(1), 18 U.S.C.A. [West 1975]; and United States v. Werker, 535 F.2d 198 [2d Cir. 1976], cert. den., sub. nom., Santos-Figueroa v. United States, ___ U.S. ___ 97 S. Ct. 330 [1977]). Moreover, this Court (see, e.g., McNabb v. United States, 318 U.S. 322, 340-341 [1943] and the several courts of appeals (see, e.g., United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991) may promulgate rules pertaining to the administration of criminal justice in the federal courts. Neither this Court nor the courts of appeals have such supervisory authority over courts of the several states [see, e.g., McNabb v. United States, supra, 318 U.S. at 340-341; and United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991]. Finally, the ABA Standards relating to Pleas of Guilty, §3.3 [Approved Draft 1968], also recommend that a trial judge not participate in plea negotiations. The standards do not state a constitutional limitation but rather prescribe a rule of practice (see, e.g., Brown v. Peyton, supra, 435 F.2d at 1357. Cf. Massiah v. United States, 377 U.S. 201, 210 [1964][White, J., dissenting). Accordingly, the only question before this Court is whether, under the circumstances of this case, due process was violated. (See, e.g., Bordenkircher v. Hayes, supra, 98 S. Ct. at 669. If due process was not violated, formulation of the contours of proper judicial involvement should be left to the states (see, e.g., United States ex rel. Robinson v. Housewright, supra, 525 F.2d at 991-992).

** We disagree with petitioner's characterization of Mr. Justice Held's statement to him concerning the sentencing alternatives (see, infra at p. 14). Assuming, arguendo, that the intent of the court's statement was to coerce a plea, the inquiry should not end at that point. The probable effect of the statement is the primary factor to be considered.

The record in the case at bar amply supports the conclusion that petitioner's plea was not coerced by the trial court's statement concerning the sentence. At the taking of the plea, petitioner, who was represented by counsel,* signaled his understanding of the legal consequences of his decision to plead guilty. Petitioner acknowledged that his plea was voluntary and was being offered because he was guilty. A factual basis for the plea was developed by the court. Lastly, petitioner stated that he was relying on no promise other than Mr. Justice Held's conditional promise concerning the sentence to be imposed. ** To be sure, these admissions are evidential on the issue of voluntariness (see, e.g., United States v. Tateo, supra, 214 F. Supp. at 564 [citations omitted]).

It should also be noted that petitioner had been incarcerated for eighteen months when he offered to plead guilty in August, 1976. *** In September, 1975, he had pleaded guilty to the same consolidated indictment and withdrew that plea three months later. Thus, within one year, petitioner twice admitted his guilt, affirmatively providing a factual basis for the plea and satisfactorily answering the court's questions. The absence of any of the indicia of innocence at the time of the taking of the plea raises questions concerning the belated assertion of

* Petitioner stated on the record that he was satisfied with his legal representation.

** The court reserved the right to break the promise "...if it turns out that I feel that I have to." Petitioner was advised that in such a case he would have the right to withdraw his plea and wipe "...the slate clean...".

*** It is no wonder, considering his criminal history and the length of his most recent incarceration, that petitioner told the probation officer who was writing the pre-sentence report that he wanted to withdraw his plea because he "...was tired of being in jail...". See, also, infra at. p. 14-15.

innocence. Indeed, defense counsel admitted to Mr. Justice Held that when the plea of guilty was offered, he assumed that petitioner was guilty.

Secondly, the plea was offered after a jury had been selected and an identification witness for the prosecution had concluded her testimony at the Wade hearing. In Brady, supra, 397 U.S. at 756, this Court recognized that,

> [o]ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and the apparent likelihood of securing leniency should a guilty plea be offered and accepted.*

Petitioner may well have preferred to plead guilty, recognizing that his chances for acquittal were slight, and thereby avail himself of a more lenient sentence. Such considerations do not militate against a finding that the plea was voluntary [Id. at 750-751].

Thirdly, petitioner was represented by counsel, was twenty-four years old, and already had an extensive criminal record, including adjudications as a juvenile delinquent and as a Youthful Offender, and a robbery conviction as an adult offender (see, e.g., Uveges v. Commonwealth of Pennsylvania, 335 U.S. 437, 442 [1948]; Johnson v. Zerbst, 304 U.S. 458, 464 [1938]; United States v. Kniess, 264 F.2d 353 [7th Cir. 1959]); McCall v. United States, 256 F.2d 936 [4th Cir. 1958]).**

* It is widely recognized that an accused who pleads guilty will receive a lighter sentence than if he chooses to go to trial and put the state to its proof (see, e.g., United States v. Stockwell, 472 F.2d 1186 [9th Cir. 1973], cert. den., 411 U.S. 948; United States ex rel. Miller v. LaVallee, 320 F. Supp. 452 [E.D.N.Y., aff'd, 436 F.2d 875 [2d Cir.], cert. den. LaVallee v. Miller 402 U.S. 914 [1970]; United States v. Rodriguez, 429 F. Supp. 520, 524, n.5 [S.D.N.Y. 1973]; and, People v. Melton, 35 N.Y.2d 327, 330, 361 N.Y.S. 2d 877, 880, 320 N.E. 2d 622 [1974]).

** Petitioner was on parole when he committed the crimes which were the subject matter of his plea.

Surely, as a predicate felon (see, e.g., N.Y. Penal Law §70.06 [McKinney's 1975]), petitioner was aware that a conviction, after trial, of robbery in the first degree would result in a maximum term of imprisonment of at least nine years to not more than twenty-five years (N.Y. Penal Law, § 70.06 [3][a] [McKinney's 1975]), and a mandatory minimum period of one-half of the maximum term (N.Y. Penal Law §70.06 [4] [McKinney's 1975]).

Moreover, petitioner was accused in two separate indictments of the crime of Robbery in the First Degree and other related offenses which were allegedly committed on different dates. If convicted, petitioner could have received the aforementioned sentences, to be served consecutively (N.Y. Penal Law §70.25 [McKinney's 1975]).*

Under these circumstances, Mr. Justice Held's statement that, subject to the pre-sentence report, he would sentence petitioner, if convicted after trial, to a term of imprisonment of twelve and one-half years to twenty-five years could hardly have come as a surprise to him. In short, petitioner was merely informed of the reality of his situation - a reality which could not have been unknown to him.

Fourth, petitioner's belated assertion of innocence is seriously undercut by his statements to the Probation Department after the plea was accepted by the court. He claimed that one reason for his decision to withdraw his plea was that he believed his sentence was excessive "...especially so because his co-defendant in [sic] indictment 431 of 1975 was sentenced to [sic] two to four years." However, he indicated that "three and a half to seven years (the original sentence promise twice rejected)

* Only one of the indictments had been moved to trial. However, the plea bargain included the second indictment.

would be acceptable to him...".

In our view, the record strongly suggests that, instead of being coerced into pleading guilty, petitioner was trying to secure the best deal up to the last possible moment. As noted above, petitioner "...was tired of being in jail...".

Petitioner's communications with the Probation Department raise questions about his protestation of innocence in that they were in direct conflict with factual assertions made by petitioner at the plea proceeding and with a fact established at the time of his arrest. Petitioner told the Department that he had not known that that his companion was in possession of a firearm and that he himself was unarmed. At the plea, petitioner stated that "the co-defendant had a weapon", and admitted that he was aware of the possession and that he knew that they were about to commit a robbery. The pre-sentence report revealed that petitioner was found in possession of a knife when he was arrested.

Lastly, petitioner's psychiatric reports indicated that he was a manipulator and a malingerer. His abusive and contemptuous behavior in the courtroom, which resulted in a contempt citation by the court, only serve to corroborate these reports. What emerges from the record is a shrewd and experienced plea-bargainer rather than an intimidated and coerced victim of an over-bearing judge.

Petitioner's reliance on the qualifying language found at p. 751, n.8 of this Court's opinion in Brady v. United States, supra, is misplaced. Assuming, without conceding, that the language may be read as suggesting that a different result might have been reached had a reluctant Brady tendered his guilty plea only after the trial judge made a statement about the sentence to be imposed if a jury returned a guilty verdict (see

Petition at p.6, n.), "...discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling." (Harris v. New York, 401 U.S. 222, 224 [1971]. See, also, People v. Patterson, 39 N.Y.2d 288, 303, 383 N.Y.S 2d 573, 583, 347 N.E.2d 898 [1976], aff'd, ___ U.S. ___, 97 S. Ct. 319 [1977] [It is basic to our common law system that a court decides only the case before it].

The record of the proceedings in the case at bar demonstate that the plea was not the product of "...mental coercion overwhelming the will of the [petitioner]." (Brady v. United States, supra, 397 U.S. at 750). Petitioner who was at all times represented by able counsel and was himself experienced in the intricacies of the criminal law and procedure, was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and realized that his chances of acquittal were slight. When viewed in this context, the court's comments pertaining to the sentencing alternatives, could not have had the effect petitioner belatedly ascribed to them. Petitioner's conduct throughout the pendency of the two indictments compels the conclusion that, rather than being coerced into pleading guilty, he was a wily bargainer seeking the best possible deal. Accordingly the affirmance of petitioner's conviction by the Appellate Division of the Supreme Court of the State of New York was in all respects correct. The petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.

Dated: Brooklyn, New York
June, 1978

Respectfully submitted,

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* The writer is indebted to Assistant District Attorney LAURIE STEIN HERSHEY who prepared the brief submitted to the Appellate Division of the Supreme Court of the State of New York, Second Department.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONER

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-6540

HAROLD RAMSEY,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This is a reply to the brief submitted by the District Attorney in opposition to the petition for a writ of certiorari in the above-captioned case.

ARGUMENT

BECAUSE HE MISCONSTRUES THE RECORD BELOW, THE DISTRICT ATTORNEY FAILS TO RECOGNIZE THE IMPORTANCE OF THE ISSUES RAISED IN THIS CASE TO THE ADMINISTRATION OF CRIMINAL JUSTICE.

The District Attorney claims to see no substantial federal question in the case at bar. He contends that the judge's participation in the plea bargaining process, although violative of Federal rules and A.B.A. standards, consisted of nothing more than an explanation of "the ranges of sentencing alternatives" offered to a "wily [plea] bargainer" who could hardly have been surprised to learn that he would receive the maximum sentence permitted by law were he to be convicted after trial. The record below unequivocally refutes this view.

The judge did not present the 12½ to 25 year term as one of several possible sentencing alternatives. He told counsel that:

> if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.

The District Attorney suggests that the judge was merely informing the petitioner "of the reality of his situation - a reality which could not have been unknown to him." But it is difficult to see why the petitioner would have suspected that the imposition of the maximum sentence was the "reality of his situation" when he had twice before been offered, and rejected, a 3½ to 7 year term which would have been only slightly greater than the very minimum sentence he could have possibly received. (See, District Attorney's Brief at 3n.)

The District Attorney contends that "[i]n the final analysis, the question to be resolved is not so much whether the judge participated in the plea discussions but, rather, what was said and its probable effect." (Id at 11) Even by this test, the District Attorney's position must fail.

After a witness had testified at the Wade hearing, the judge extended an offer of from 6 to 12 years. As counsel later recalled:

> I came back and said to [the petitioner] six to twelve, and he said no,...

It was only after the petitioner had rejected this offer that the judge saw fit to warn him gratuitously that if he

continued to insist on a trial and were convicted, "he is going to get twelve and a half to twenty-five." The petitioner's immediate response was to accept the plea offer.

Plainly, then, what was said was an undisguised threat to impose a much harsher sentence after trial in order to induce a plea of guilty. Its effect was to persuade the petitioner to accept the very same offer he had flatly rejected only minutes before.

The record belies the District Attorney's suggestion that the petitioner "was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and realized that his chances of acquittal were slight." (Id at 16.) The only event intervening between his rejection of the 6 to 12 year plea offer and his decision minutes later to accept it was the issuance of the trial judge's warning. Hence, the record supports the petitioner's strenuous assertions at sentencing that his plea had been the result of judicial coercion. And indeed, even counsel opined, "in light of everything, that that was the basis of why the [petitioner] took the plea."

The District Attorney's reliance on the plea allocution is equally unpersuasive. Standing alone, the plea minutes establish a valid predicate for the entry of conviction, and admittedly seem to indicate that the plea was being voluntarily offered. It has now been established, however, that the plea catechism had followed off-the-record exchanges which made a mockery of the petitioner's prefunctory agreement at the allocution that his plea had not been coerced.

The petitioner's remark to the Probation Department that, although innocent, he had pleaded guilty because he was "tired of jail" does not support the view that the plea was freely given. To a man who had been incarcerated for some eighteen months awaiting trial, and who was tired of jail, the prospect of the threatened 12½ to 25 year sentence would have been all the more coercive.

Finally, in view of the District Attorney's response, the petitioner should make clear that he does not seek to level a broad attack on the plea bargining process. He does not quarrel with the notion that a criminal defendant may voluntarity plead guilty, induced to do so by the hope that he will receive a lesser sentence than the one he might expect upon a conviction after trial.

He does maintain, however, that when a trial judge gratuitously intervenes in the plea bargaining process by threatening to impose after trial a significantly harsher sentence, in order to induce a guilty plea, serious due process questions arise. Those questions should be addressed by this Court.

The practice of plea bargaining pervades our criminal justice system.* Because this is so, the constitutional limits of judicial participation in the process must be defined. This case offers the Court a proper vehicle through which to set those limits. Therefore, certiorari should be granted.

* In New York City, during 1976, 89.7% of all dispositions of felony indictments were made prior to trial. In the remainder of New York State, in the same year, the figure was 93.4%. State of New York, Twenty-Second Annual Report of the Judicial Conference (1977), 52-55.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE WRIT OF CERTIORARI PRAYED FOR HEREIN SHOULD BE GRANTED.

Dated: Brooklyn, New York
June 28, 1978

Respectfully submitted,
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Of counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

v.

NEW YORK,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, Second Judicial Department, unanimously affirmed the petitioner's conviction without opinion. The affirmance is reported at 61 App. Div. 2d 889, 401 N.Y.S.2d 671 (2nd Dept. 1978). (App. 36.) Chief Judge Charles D. Breitel denied the petitioner's application for leave to appeal to the Court of Appeals of the State of New York. The denial of leave is reported at 44 N.Y.2d 738 ____ N.E.2d ____ , 405 N.Y.S.2d xci (1978). (App. 37.)

JURISDICTION

The order of the Appellate Division was dated February 6, 1978. The certificate denying leave to appeal was dated March 17, 1978. The petition for a writ of certiorari was filed on April 10, 1978. Certiorari was granted on October 10, 1978. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a guilty plea is obtained in violation of due process of law when it is induced by a judge's threat to impose upon conviction after trial a sentence which is nearly four times greater than one once proposed to the defendant, and more than twice as great as the sentence the judge then holds out to him as part of a plea offer.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> ...No State shall...deprive any person of life, liberty, or property without due process of law;...

STATEMENT OF THE CASE

HAROLD RAMSEY, the petitioner, stands convicted upon a guilty plea which he contends was the product of unconstitutional judicial coercion. He seeks to have the plea

vacated and to be permitted to stand trial on the underlying charges.

In 1975 the petitioner was named in two Kings County Indictments, each charging him with the crime of robbery in the first degree and lesser included offenses.[1] (App. 2, 38.) The petitioner was a second felony offender, (App. 21.), and as such, he could receive no lesser sentence than an indeterminate term of from 4½ to 9 years incarceration upon conviction for the charged crime; he was subject to as much as a term of from 12½ to 25 years imprisonment. N.Y. Penal Law, *supra*, Sec. 70.06.[2] Were he convicted of first degree robbery under both indictments and given consecutive sentences, the absolute maximum the petitioner faced was an indeterminate term of from 12½ to 30

[1]Section 160.15 of the Penal Law of New York provides in pertinent part: "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:...3. Uses or threatens the immediate use of a dangerous instrument; or 4. Displays what appears to be a pistol, revolver,...or other firearm. (Consolidated Laws of New York, Book 39, McKinney's 1975).

[2]In New York, a second felony offender faces restrictions on permissible plea bargaining and enhanced sentencing upon conviction. Charged with a felony, he may not dispose of his case by pleading guilty to other than a felony charge. N.Y. Crim. Pro. L. Sec. 220.10(5)(d) (Consolidated Laws of New York, Book 11A, McKinney's Supp. 1977). Additionally, upon conviction, the court is required to specify a minimum term equal to one-half of the maximum term imposed. N.Y. Penal Law, *supra*, Sec. 70.06(4).

In contrast, one who is not a second felony offender may receive a specified minimum term only in cases involving serious felonies, and then only when the court feels that the circumstances of the crime and the history and character of the defendant warrant it. In no event, however, may such minimum term exceed one-third of the maximum term imposed. N.Y. Penal Law, *supra*, Sec. 70.00(3)(b).

years imprisonment. *See*, N.Y. Penal Law, *supra* Sec. 70.30(1)(b) & (c).

As the petitioner's case progressed through the courts, several judges at various stages directed that he undergo psychiatric evaluation to determine whether he was fit to proceed.[3] (App. 76, 88, 98.) He was found fit on all but one occasion when he was ordered held for temporary observation. (App. 82-83.)

The several psychiatric reports submitted to the court contained divergent views. Some skepticism was expressed over whether the petitioner's exhibited behavior reflected true illness. (App. 81, 92-93, 95, 102.) Elsewhere, however, the petitioner was described as a young man of "average or dull-normal" intelligence (App. 103.) who suffered from an unspecified psychosis (App. 81.) or personality disorder with a history of drug dependence. (App. 95, 104.) His disturbance was linked to a broken home and to the abusive behavior of an alcoholic father. (App. 94, 103.) It was also suggested that the petitioner might have been "stigmatized and hurt" by his placement as a child at the Willowbrook State School following a mistaken diagnosis of retardation (App. 94.) One examiner, however, flatly concluded that petitioner was a malingerer (App. 92-93.)

On September 8, 1975, the petitioner appeared in the Conference Part of the Supreme Court, Kings County, where he offered to plead guilty to the charge of robbery in the second degree in full satisfaction of both pending indictments (App. 41-42.) His plea was conditioned upon

[3]*See*, N.Y. Crim. Pro. L., *supra* Art. 730 (McKinney's 1971).

the court's promise to impose an indeterminate sentence of from 3½ to 7 years imprisonment. (App. 43.)[4]

On December 19, 1975, the petitioner withdrew his guilty plea, and both indictments were transferred to a Trial Part. There on August 3, 1976, a *Wade* hearing was begun on Indictment No. 2588/1975. (App. 49.)[5] The one witness called, Miss Rebecca Walker, testified that on the evening of December 30, 1974, the petitioner had robbed her and another woman at gunpoint in a beauty salon. (App. 50-51, 67-68.) She claimed to have seen the petitioner twice before in the area (App. 53-56, 60-65.) and she assured the court that she would remember the petitioner's face for the next twenty years. (App. 64.) On cross-examination, she denied that the police had shown her a single photograph of the petitioner, and she further denied having told a defense investigator that that had occurred. (App. 68-73.) The day of testimony ended with defense counsel promising to produce the investigator to whom Miss Walker had made the statement. (App. 73-75.)

The following day, however, no further testimony was taken. Instead the petitioner offered to plead guilty to the charge of robbery in the first degree, to cover both indictments. The plea was given upon the promise of a 6 to 12 year sentence. (App. 5.) The District Attorney stated that the plea was acceptable to him; he had no sentence recommendation and indicated that he would have none. (App. 6.)

In due course, the petitioner said he understood that by pleading guilty he was waiving his right to trial and all

[4]The very minimum sentence the petitioner could have received upon a conviction for robbery in the second degree was an indeterminate term of from 3 to 6 years. N.Y. Penal Law, *supra*, Sec. 70.06(3).

[5]N.Y. Crim. Pro. L., *supra*, 710.20(5) (McKinney's Supp. 1977).

associated rights. (App. 6-7.) In a perfunctory fashion, he agreed that his plea had not been the product of force or threats and was being voluntarily offered. (App. 7.) Then, responding to a series of questions posed by the judge, the petitioner acknowledged that he had taken some $150 at gunpoint from people at a beauty parlor on December 30, 1974. (App. 8-9.) At the judge's suggestion, the District Attorney requested a similar admission addressed to the acts underlying the second indictment. (App. 8.) Again responding to the judge's questions, the petitioner agreed that on January 20, 1975, he had committed a robbery in a store aided by an armed accomplice. The petitioner did not know how much money had been taken. (App. 9.) The guilty plea was accepted, and the case was adjourned for sentence. (App. 10-11.)

The petitioner's dissatisfaction with the plea, and with his treatment at the hands of the judge, was subsequently expressed at his Probation Department interview. As revealed in the report of that interview, later read into the record by the judge, the petitioner insisted he was innocent. (App. 31-32.) He claimed that he had accepted the plea "for purposes of his own convenience," on advise of counsel, and because he was "tired of being in jail." He had decided not to go to trial because the judge had made a "prejudicial" decision at the *Wade* hearing and "was prejudicing the Jury during the time of selection." The petitioner complained that he was unable "to change Judges" and that "he was afraid of being sentenced to the maximum time." Finally, the petitioner felt that the sentence he was to receive was excessive, especially in view of the 2 to 4 year term imposed upon his co-defendant. The petitioner said that a 3½ to 7 year term would be acceptable

and that he was thinking of withdrawing his guilty plea if the judge insisted on following through with the 6 to 12 year sentence. (App. 32.)

The petitioner subsequently submitted a formal motion to withdraw his guilty plea. The motion was supported by the affidavits of the petitioner and defense counsel. (App. 12.) In his affidavit, the petitioner averred that on August 2, 1976, he had received a plea offer carrying a promise of a 3½ to 7 year sentence, and that he had turned it down, insisting he was innocent. He further claimed that after the *Wade* hearing he had been informed by the judge through counsel that he would receive a 12½ to 25 year sentence if convicted after trial. His affidavit continued, "Upon hearing this staggering jail sentence, and being wearied by having already spent so much time in jail, to wit, 1½ years awaiting trial, I jumped at the offer of a lesser jail term, and against my better judgment, pleaded guilty to crimes I did not commit." (App. 14-15.)

Counsel's supporting affidavit also asserted that the petitioner had refused the 3½ to 7 year sentence offer, that he had claimed he was innocent and that he had asked to proceed to trial. Counsel noted further that, "since the inception of my assignment to defend him the [petitioner] has maintained his innocence...." (App. 16.)

On September 17, 1976, the petitioner appeared for sentence. The judge was aware of the motion and indicated that, although it was returnable on a later date, he was prepared to advance it and decide it forthwith. First, however, he found it appropriate to adjudicate the petitioner a second felony offender in preparation for sentence. (App. 18-19.)

Turning then to the motion, the judge suggested that the District Attorney would have no objection to having it heard and decided then and there. Although the District Attorney claimed to have no notice of the motion, he in fact offered no objection to the judge's proposal, and he took no part in what followed. (App. 21.)

The judge began by reading from the transcript of the plea proceeding at which the petitioner had admitted the commission of the crimes. (App. 22-24.) When permitted to speak, however, the petitioner repudiated those admissions. He said:

> The only reason I took that plea on that day is because you harassed my lawyer in front of the Jury, you understand?
>
> You intimidated him.
>
> * * *
>
> I am telling you I am not guilty. The only reason I took my plea is because I was coerced.
>
> You also told my attorney if I have a trial you will give me twelve to twenty-five years, and he told me that.
>
> * * *
>
> You also started making remarks about a mess of people in the beauty parlor and you already had me tried and convicted.
>
> You said that is my line of work.
>
> When my lawyer said to you that he was ready, we came to the courtroom and you asked my attorney, and he said yes, and you said you are going to trial, and my attorney said yes, and you said I guess your client is innocent.

> You are motherfucking right I am innocent. (App. 24-25.)[6]

The petitioner continued:

> I am innocent and the only reason I took the plea is because you are prejudice [sic].
>
> I know I cannot get a fair trial from you, and I definitely don't trust you. It is impossible to get a fair trial in front of you. (App. 26.)

The judge denied the application to withdraw the plea and declined to "belabor the record by retorting to the vile accusations" made against him. He simply denied them as "falsehood[s]." (App. 26.)

It was at this point, finally, that defense counsel entered the discussion, having been asked by the judge if he had "anything further...to say." (App. 27.) As counsel began, the judge immediately interrupted, indicating that he knew what counsel was about to say. The judge recalled that prior to the *Wade* hearing, he had said at a bench conference that he would probably agree to a guilty plea to robbery in the second degree and a sentence of 3½ to 7 years to cover both indictments. The judge indicated that the disposition would have been subject to a reading of the probation report. Counsel, however, reminded the judge that the petitioner had rejected the proposal, claiming that he was innocent, and that the *Wade* hearing had followed. (App. 27.)

---

[6]When it became clear to the petitioner that his request to withdraw the plea would not be seriously considered, he began to resort to profanity and invective directed at the judge. For this misconduct the petitioner was adjudged in contempt of court and was summarily sentenced to serve thirty days in jail prior to the commencement of his sentence on the conviction. (App. 25, 105-106.) In reaction to the petitioner's use of profanity, the judge ordered him gagged, and later directed that he be handcuffed to his chair. (App. 25, 30.)

Counsel then offered his own recollection of what had transpired after the hearing:

> It was a Miss Walker, your Honor, and it was the only one that took the stand, and after that witness, there was some talk about a plea of guilty, and at that time, the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.
>
> I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.
>
> * * *
>
> We arived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at that time I did, Judge. I gave him that warning. (App. 28.)

The judge said:

> Subject of course of me reading the probation report. It is a practice in my court when there is an armed robbery, to give a maximum sentence, unless there are mitigating circumstances. (App. 28.)

Counsel replied:

> Well, I think your Honor in light of everything, that that was the basis of why [the petitioner] took the plea. (App. 28.)

Further discussion established that when the guilty plea was entered, the defense was ready for trial, a jury had been selected, and the judge was "the trial Judge on the case." (App. 28.)

After repeating that the motion to withdraw the plea was denied, the judge read into the record the petitioner's unflattering probation report which included a rendition of his criminal history that had had its beginning when he was a juvenile. (App. 30-31.) Finally, the judge noted:

> The defendant shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive. (App. 33.)

Sentence was imposed, and the petitioner appealed to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. He argued that his plea had been the product of judicial coercion. The court unanimously affirmed the conviction without opinion (App. 36.), and Chief Judge Charles D. Breitel subsequently denied leave to appeal to the Court of Appeals of the State of New York. (App. 37.)

Certiorari was granted by this Court on October 10, 1978, and the question presented for review involves whether the petitioner's guilty plea was voluntary in view of the judicial conduct which induced it.

SUMMARY OF ARGUMENT

The petitioner contends that his guilty plea was obtained in violation of due process of law because it was coerced by the trial judge's unconstitutional interference in the plea bargaining process.

The practice of plea bargaining has as its central feature the defendant's willingness to surrender simultaneously a number of fundamental constitutional rights, and to forgo

all challenge even to the most egregious defects in his prosecution. Because a guilty plea has such serious and far-reaching consequences, its validity presupposes that it is the product of the defendant's voluntary choice. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

The process of plea bargaining is, to some extent, inherently coercive and often presents a defendant with a choice between unpleasant alternatives. Nevertheless, the law finds nothing wrong in compelling him to choose, provided that he is not made to face considerations which the government may not constitutionally inject into the decision-making process. *Parker v. North Carolina*, 397 U.S. 790, 802 (Opinion of BRENNAN, J., in which DOUGLAS, J., and MARSHALL, J. joined.). The petitioner contends that the active participation of a trial judge in pre-plea negotiations gives rise to such considerations and therefore must be prohibited.

When a judge participates in plea discussions, his impartiality is necessarily compromised because he naturally concludes that the defendant who expresses an interest in pleading guilty is almost certainly guilty in fact. Further, when a judge proposes a specific disposition, he presumably does so believing it to be fair for all concerned, and will likely view the defendant's rejection of the offer as an effort to hold out for an undeserved benefit.

In themselves, these factors are not inherently coercive. However, when the judge involved in the plea negotiations is also the judge who will preside at the prospective trial, the impact of his participation upon the defendant's choice is substantial. In such circumstances, the defendant must contend with the fear that, should he decide to stand trial, he will now face a judge who believes him to be not only a

guilty man, but one who has rejected a fair disposition of his case. The defendant will know that that judge will both control his sentence in the event of conviction and make the crucial discretionary rulings at trial that might well determine its outcome. *Cf. United States v. Werker*, 535 F.2d 198 (2d Cir. 1976), *cert. denied*, 429 U.S. 926. These considerations needlessly discourage the exercise of the defendant's constitutional right to trial.

Participation by a trial judge in plea bargaining is a practice that has provoked near universal condemnation — either as requiring reversal *per se* (*see, e.g., Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 [1969]) or as simply another coercive factor to be weighed in determining the voluntariness of a given guilty plea, (*see, e.g., Anderson v. State,* 263 Ind. 583, 335 N.E.2d 225 [1975]). Few would suggest that it is an intrinsic component of plea bargaining,[7] or that it serves some salutory purpose that could not be achieved by the limited participation of a judge who was not to preside at trial.

The petitioner submits therefore that, because, at best, participation by a trial judge is a significant factor tending to induce or encourage the waiver of a defendant's constitutional right to plead not guilty, and because such participation is neither inherent in, nor necessary to, the plea bargaining process, any scheme which permits a trial judge to participate in plea negotiations is unconstitutional. *United States v. Jackson*, 390 U.S. 570 (1968). Since the petitioner's guilty plea resulted from discussions in which the trial judge took an active part, the plea must be vacated.

Moreover, even if a trial judge's participation in plea bargaining is not unconstitutional *per se*, the judicial

[7] *See, e.g.*, Fed. R. Crim. Pro. 11(e) prohibiting judicial participation in the negotiation of guilty pleas.

comments at issue here, standing alone, require reversal. They constituted a plain abuse of the judge's awesome sentencing power, and were clearly calculated to overwhelm the reluctant petitioner and to induce him to tender a guilty plea. Hence they were an affront to all notions of due process and invite condemnation no matter what result they actually produced. *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957). And on this record, it is manifest that they produced the petitioner's guilty plea.

Although he had heard a prosecution witness identify him as the perpetrator of the charged crime, the petitioner nevertheless flatly rejected the plea offer which included the 6 to 12 year sentence. (App. 27-28.) The only event intervening between that rejection and the petitioner's acceptance of the very same offer shortly thereafter was the trial judge's gratuitous threat to impose upon conviction after trial fully twice the sentence held out as part of the plea offer. The guilty plea was therefore demonstrably the direct product of judicial coercion and must be set aside. *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting).

ARGUMENT

THE PETITIONER'S GUILTY PLEA WAS THE INVOLUNTARY PRODUCT OF UNCONSTITUTIONAL JUDICIAL PARTICIPATION IN THE PLEA BARGAINING PROCESS. AS SUCH, IT WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW AND MUST BE SET ASIDE.

Only in the relatively recent past has plea bargaining achieved acceptance as a legitimate component in the administration of criminal justice. (*See, Blackledge v. Allison*, 431 U.S. 63, 76 [1977].) However, well over a decade ago it was commonly estimated that some ninety percent of all criminal convictions resulted from guilty pleas. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

A state defendant who chooses to plead guilty not only consents to the impositon of judgment, (*cf. Boykin v. Alabama*, 395 U.S. 238, 242 [1969]), but, in doing so, he waives his fundamental constitutional rights to a jury trial, (*Duncan v. Louisiana*, 391 U.S. 145 [1968]), to confront his accusers, (*Pointer v. Texas*, 380 U.S. 400 [1965]), to present witnesses in his defense, (*Washington v. Texas*, 388 U.S. 14 [1967]), to remain silent, (*Malloy v. Hogan*, 378 U.S. 1 [1964]), and to avoid conviction except upon proof of guilt beyond all reasonable doubt, (*In re Winship*, 397 U.S. 358 [1970]). He also surrenders all opportunity for further challenge even to the most serious antecedent defects in his prosecution. *Tollett v. Henderson*, 411 U.S. 258 (1973).

Central to the validity of so solemn and significant a waiver is its voluntariness. *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The petitioner contends that his guilty plea was not voluntary and therefore cannot stand.

A. THE ACTIVE PARTICIPATION OF A TRIAL JUDGE IN PLEA NEGOTIATIONS RENDERS ANY RESULTING GUILTY PLEA INVOLUNTARY AND VOID.

The clear consensus of legal opinion holds that judges should not participate in plea negotiations.[8] The same view

[8] *See, e.g.*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, §3.3(a) (App. Draft 1968) (*But, see*, Approved Draft of the Standing Committee on Association Standards for Criminal Justice [1978] modifying §3.3 to permit a judge to act as "moderator" at a plea conference held at the request of both sides and to advise the parties as to what disposition would be "acceptable to him."); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS REPORT §3.7 (1973): NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW, UNIFORM RULES OF CRIMINAL PROCEDURE 441(a) (1974); *cf.* AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §350.3(5) (1975); INFORMAL OPINION OF THE PROFESSIONAL ETHICS COMMITTEE, No. 779, 51 A.B.A.J. 444 (1965); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 584-585 (1977); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R. & C.L. L. REV. 29 (1974); White, *A Proposal for the Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 452-453 (1971) Comment, *Judicial Supervision Over California Plea Bargaining: Regulating the Trade*, 59 CAL. L. REV. 962, 995 (1971); Note, *Judicial Plea*

(continued)

is not without substantial support in the nation's statutory and case law.[9] The petitioner submits that due process mandates the absolute prohibition of active judicial participation in plea bargaining whenever the judge involved is also the judge who will preside at trial.

The trial judge and the defendant stand on vastly different footing when they engage in negotiations regarding a guilty plea. As Judge Weinfeld wrote in what has become familiar language:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison at once raise a

(footnote continued from preceding page)

Bargaining, 19 STAN. L. REV. 1082, 1090 (1967); Note, *Official Inducements to Plead Guilty: Suggested Morals For a Marketplace*, 32 U. CHI. L. REV. 167, 187 (1964). *But, see, e.g.*, Note, *Restructuring the Plea Bargain*, 82 YALE L. J. 286 (1972); Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1971).

[9] *See, e.g.*, Fed. R. Crim. Pro. 11(e); Pa. R. Crim. Pro. 319(b)(1) (Purdon's 1978); 6 N.M. Stat. Annot. Crim. Pro. Rules, Rule 21(g)(1) (Supp. 1975); *United States v. Werker*, 535 F.2d 198 (2nd Cir. 1976), *cert. denied*, 429 U.S. 926; *Scott v. United States*, 419 F.2d 264, 273 (D.C. Cir. 1969) (dictum); *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967); *State v. Buckalew*, 561 P.2d 289 (Sup. Ct. Alaska 1977); *State v. Cross*, ____ S.C. ____, 240 S.E.2d 514 (1977): *State v. Gumienny*, ____ Haw. ____, 568 P.2d 1194 (1977); *State v. Svoboda*, 199 Neb. 452, 259 N.W.2d 609 (1977); *Ex parte Schuflin*, 528 S.W.2d 610, 617 (Tex. Cr. App. 1975); *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973); *Rahhal v. State*, 52 Wis. 2d 144, 187 N.W.2d 800 (1971) (dictum); *State v. Wolfe*, 46 Wis. 2d 478, 175 N.W.2d 216 (1970); *Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 (1969); *State v. Byrd*, 203 Kan. 45, 453 P.2d 22 (1969); *State v. Tyler*, 440 S.W.2d 470 (Sup. Ct. Mo. 1969); *People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802 (Ct. App. Mich. 1968), *rev'd* 383 Mich. 82, 173 N.W.2d 205 (1970); *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968); *Rogers v. State*, 243 Miss. 219, 136 So.2d 331 (1962); *Mismer v. Raines*, 351 P.2d 1018 (Okl. Cr. 1960).

question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence. A guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act. The plea is so interlaced with the promise that the one cannot be separated from the other; remove the promise and the basis for the plea falls.

> A judge's prime responsibility is to maintain the integrity of the judicial system; to see that due process of law, equal protection of the laws and the basic safeguards of a fair trial are upheld. The judge stands as the symbol of evenhanded justice, and none can seriously question that if this central figure in the administration of justice promises an accused that upon a plea of guilty a fixed sentence will follow, his commitment has an all-pervasive and compelling influence in inducing the accused to yield his right to trial. A plea entered upon a bargain agreement between a judge and an accused cannot be squared with due process requirements of the Fourteenth Amendment.

United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (footnotes omitted). See, also *Parker v. North Carolina*, 397 U.S. 790, 804 (1970) (Opinion of

BRENNAN, J., in which DOUGLAS, J. and MARSHALL, J. joined); *Brown v. Peyton*, 435 F.2d 1352, 1358 (4th Cir. 1970) (Winter, C.J., dissenting), *cert. denied*, 406 U.S. 931; *Scott v. United States*, 419 F.2d 264, 279-280 (D.C. Cir. 1969) (Wright, C.J., concurring); *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966); *cf. Schaffner v. Greco*, ____ F. Supp. ____ (S.D.N.Y. 1978) (77 Civ. 281; decided 10/20/78) (Lasker, D.J.) slip opn. at 6; *People v. Heddins*, 66 Ill. 2d 404, 362 N.E.2d 1260, 1263 (1977) (Dooley, J., concurring); *Anderson v. State*, 263 Inc. 583, 335 N.E.2d 225, 227 (1975).

When a trial judge enters plea negotiations, the defendant necessarily becomes subject to additional and significant pressure to surrender his right to trial because the potential cost to him of rejecting a plea offer is significantly increased. From the start, the judge's impartiality is compromised because he is bound to conclude that when a defendant expresses an interest in pleading guilty, he almost certainly is guilty in fact. Should the judge then make a plea offer which the defendant rejects, he will likely view the defendant as a guilty man who is unwilling to accept a fair disposition of his case. *Cf. United States v. Werker*, 535 F.2d 198, 201-202 (2nd Cir. 1976), *cert. denied*, 429 U.S. 926. The defendant will necessarily be aware that, because the judge will carry those views into the trial, and because he will not only control the sentence in the event of conviction[10] but will also hold great sway over the jury, a

[10]In a number of states, the jury rather than the judge imposes the sentence in many cases. *See,* Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1084 n. 15 (1967). However, the judge still controls the trial and his impartiality may find its way into his discretionary rulings. Indeed, while a marked disparity in sentencing may be plain on the record, a defendant has far less protection against the subtle influence a judge may exercise over a jury.

rejection of the plea offer may well subject the defendant to a trial not fully free of hostile judicial influence. *United States v. Werker, supra; Brown v. Peyton, supra*, at 1358 (Winter, C.J. dissenting.) The participation by the trial judge in plea negotiations, then, compels the defendant to add to his list of serious concerns the possibility that rejection of a plea offer will result in a trial had before a judge who is unfavorably disposed towards his efforts to secure acquittal. The danger of standing trial before an unfair tribunal is one that no defendant need ever face or fear under our system of law. *Cf. In re Murchison*, 349 U.S. 133, 136 (1955)[11].

The proposed prohibition of participation by trial judges in plea negotiations is supported by this Court's analysis in *United States v. Jackson*, 390 U.S. 570 (1968). The Court there, although not establishing any new test for measuring the voluntariness of a guilty plea, (*see, North Carolina v. Alford*, 400 U.S. 25, 31 [1970]), examined the constitutionality of a statutory scheme which encouraged such pleas as well as jury waivers by exposing to the death penalty only those defendants who demanded a jury trial. The Court struck down the statute, and wrote:

> The inevitable effect of any such provision is, of course to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.
>
> * * *
>
> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights . . . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.
>
> * * *
>
> . . . [The] evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden on the assertion of a constitutional right.

390 U.S. at 581-583. *Cf. Nieves v. United States*, 280 F. Supp. 994 (S.D.N.Y. 1968). The test of *Jackson* then is whether a procedure which chills the exercise of a constitutional right or encourages its waiver is a necessary feature of a constitutionally legitimate process. *See, Chaffin v. Stynchcombe*, 412 U.S. 17, 44-45 (1973) (MARSHALL, J., dissenting).

Judicial participation in plea bargaining is generally viewed in one of two ways: It is seen either as an intolerably coercive factor which, standing alone, requires the setting aside of any guilty plea it produces, (*see, e.g., Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 [1969]; *People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802 [Ct. App. Mich. 1968], rev'd, 383 Mich. 82, 173 N.W.2d 205 [1970]), or as simply one coercive factor to be measured along with other relevant circumstances to determine the voluntariness of any given guilty plea, (*see, e.g., Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970), *cert. denied*, 406 U.S. 931; *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 315 (2nd Cir. 1963) (Friendly, J., concurring and dissenting); *Anderson v. State*, 263 Ind. 583, 335 N.E.2d 225 (1975).

[11]The petitioner below vigorously asserted that the trial judge had responded with a sarcastic remark when told that the petitioner intended to go to trial (App. 25.) He also claimed that the judge was prejudicing the jury during selection. (App. 32.)

It would be difficult to contend seriously that the active participation of a trial judge does not tend to coerce disposition without trial and the surrender of the constitutional right to plead not guilty. And seemingly no one would suggest that judicial participation is a necessary feature of the plea bargaining process. *Cf.* Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1090 (1967).[12]

Hence the participation of the trial judge in plea negotiations needlessly and significantly encourages the defendant to waive his right to stand trial. Without advancing any state interest (*see, Chaffin v. Stynchcombe*, 412 U.S. 17, 46 [1973] [MARSHALL, J., dissenting]), it injects into the defendant's decision-making process the fear that if he does not accept the judicially proffered disposition he will not be afforded a fair trial before an impartial magistrate. Such unconstitutional considerations simply may not burden the defendant's choice. (*See, Parker v. North Carolina*, 397 U.S. 790, 802 (1970) (Opinion of BRENNAN, J., in which DOUGLAS, J. and MARSHALL, J., joined). Although certainly not all guilty pleas entered after negotiations with a trial judge are involuntary, the needless encouragement of waiver, intrinsic to the practice, renders it invalid. *United States v. Jackson, supra; cf.* Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325, 330 (1972). In order, then, to insulate defendants from unnecessary additional coercion, in a process that is already inherently coercive,

[12]In the United States District Courts, for example, where judicial participation in plea bargaining is prohibited, (*see*, Fed. R. Crim. Pro. 11[e]), over 85 percent of those convicted in the year ending June 30, 1977, pleaded guilty or nolo contendere. *See, Annual Report of the Director of the Administrative Office of the United States Courts*, 370 (1977).

this Court should prohibit trial judges from participating in plea negotiations. *Gordon v. State*, 577 P.2d 701 (Sup. Ct. Alaska 1978)[13].

Finally, it should be stressed that the petitioner does not contend that due process broadly prohibits all judicial participation in plea bargaining. A defendant becomes subject to unfairly coercive influence only when he knows that the judge with whom he is negotiating will preside at trial if no disposition is reached. It is the fear of a punitive sentence and of a trial conducted under hostile judicial influence that improperly encourages a defendant to plead guilty. *United States v. Werker*, 535 F.2d 198 (2nd cir. 1976), *cert. denied*, 429 U.S. 926; *Brown v. Peyton*, 435 F.2d 1352, 1358 (4th Cir. 1970) (Winter, C.J., dissenting), *cert. denied*, 406 U.S. 931.[14]

[13]Excluding trial judges from plea negotiations would serve important salutary purposes other than diminishing the danger that "the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty." *Parker v. North Carolina, supra*, at 809 (Opinion of BRENNAN, J.) It would promote finality in litigation since fewer defendants could contend that their guilty pleas were coerced by trial judges. *United States v. Werker, supra*, at 205; *cf. Blackledge v. Allison*, 431 U.S. 63, 83-84 (1977) (POWELL, J. concurring); *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (HARLAN, J., dissenting). Moreover, it would put an end to those unproductive hearings at which the issue raised is whether a judge's remarks influenced a defendant to plead guilty, a factual question often more difficult to resolve than would be the defendant's guilt or innocence on the original charge. *See, People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802, 815 (Ct. App. Mich. 1968), *rev'd* 383 Mich. 82, 173 N.W.2d 205 (1970). *See, also, McCarthy v. United States*, 394 U.S. 459, 469 (1969).

[14]Significantly, the petitioner below expressed precisely these fears, both to the Probation Department and to the judge himself. (*See*, App. 25, 26, 32).

In petitioner's view, therefore, due process would not prevent a state from establishing procedures whereby judges who will not preside at trial participate in plea bargaining.[15] With the aid of proper safeguards, the judge who ultimately presides at trial under such a system might well be persuaded to credit more seriously the claim of innocence of the defendant before him if for no other reason than that he has apparently rejected all offers to plead guilty at earlier stages. *Cf.* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 306 (1972). And those defendants who are truly interested in plea bargaining would be permitted access to a judge and might thereby avoid the necessity of "pleading in the dark." *See*, Note, *Official Inducements to Plead Guilty: Suggested Morals For a Marketplace*, 32 U. CHI. L. REV. 167, 183 (1964); *cf. United States ex rel. Rosa v. Follette*, 395 F.2d 721, 726 (2nd Cir. 1968), *cert. denied*, 393 U.S. 892.

In sum, participation by a trial judge in the negotiation of a guilty plea is a needlessly coercive factor tending to encourage the waiver of the defendant's right to plead not guilty. Because such participation is not an "inevitable attribute" of the legitimate practice of plea bargaining, (*cf. Bordenkircher v. Hayes*, 434 U.S. 357 [1978]), it is constitutionally impermissible. The petitioner's guilty plea

[15]The petitioner's initial guilty plea was entered in a so-called Conference Part established especially for pre-trial plea discussions with the prosecutor and with the judge who does not preside over trials. *See*, New York Court Rules §751.3(1) (Consolidated laws of New York, McKinney's 1977), *See, also*, Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1090 n. 78, McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1157 (1970).

which resulted from negotiations in which the trial judge played an active part, must therefore be set aside.

B. EVEN IF THE PARTICIPATION OF THE TRIAL JUDGE IN NEGOTIATIONS DID NOT RENDER THE GUILTY PLEA INVALID *PER SE*, THE NATURE AND PURPOSE OF HIS REMARKS REQUIRE THAT THE PLEA BE VACATED.

At the conclusion of the *Wade* hearing, the trial judge extended to the petitioner a plea offer carrying a sentence of from 6 to 12 years. Only upon learning that the petitioner had rejected the offer, did the judge see fit to warn him, through counsel, that conviction after trial for the same offense would bring a sentence of from 12½ to 25 years. (App. 28.)

Under these circumstances, it is clear that the judge's remarks constituted an undisguised threat calculated to overwhelm the reluctant petitioner and to induce him to tender a guilty plea. That being so, a right sense of justice demands that the plea be vacated. *See, United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508, 515-516 (E.D.N.Y. 1967). *See also, United States v. Anderson*, 468 F.2d 440, 442 (5th Cir. 1972); *Tyler v. Swenson*, 427 F.2d 412, 414 n. 1 (8th Cir. 1970); *Euziere v. United States*, 249 F.2d 293, 294-295 (10th Cir. 1957); *Kelly v. State*, 44 Ala. App. 307, 208 So.2d 217 (1968); *Letters v. Commonwealth*, 346 Mass. 403, 139 N.E.2d 578 (1963).[16]

[16]In *Brady v. United States*, 397 U.S. 742 (1970) this Court called for an examination of all relevant circumstances in determining the voluntariness of a guilty plea. *Id.* at 749-750. However, the Court took

(continued)

It is imperative for this Court to condemn judicial threats of the sort evidenced in this record. "The prestige and influence of a . . . judge, particularly in relation to a defendant under indictment who stands before him for trial, is so enormous that a strong suggestion from the judge amounts to a command and a command that must be obeyed." *United States v. Cariola*, 323 F.2d 180, 188 (3rd Cir. 1963) (Biggs, Ch. J. concurring and dissenting). The only effective method of deterring judicial over-reaching is to vacate any plea it produces. *Cf. United States ex rel. Thurmond v. Mancusi, supra.*

In the case at bar, the judge admittedly attempted to explain his comments by stating that the maximum sentence would have been imposed, if at all, after a reading of the probation report. The judge stated that it was his policy to impose a maximum sentence for an armed robbery unless mitigating factors were present, and presumably he had planned to search the probation report for such factors. The judge's explanation, however, offered after the fact, does not change what must be the result in this case.

(footnote continued from preceding page)

care to note that, "We here make no reference to the situation where the . . . judge . . . deliberately employ[s] [his] . . . sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim . . . that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty." *Id.* at 751 n. 8. It would appear, then, that *Brady's* "all relevant circumstances" test was not meant to apply where a trial judge, for the purpose of inducing a guilty plea, threatens to impose a harsher sentence upon conviction after trial. In such circumstances, the application of a *per se* reversal rule would in no way conflict with the *Brady* holding. Indeed, this Court has previously given tacit approval to the principle that a judge's threat of the sort the petitioner received below casts serious doubt over the validity of any guilty plea it produces. *See, McMann v. Richardson*, 397 U.S. 759, 774 (1970).

First, a fair reading of the record reveals that the message sent to the petitioner did not include the suggestion that the imposition of the threatened 12½ to 25 year term would depend upon the contents of the probation report. Moreover, leaving aside the question of whether an announced policy of imposing maximum sentences on convictions for armed robbery would be consistent with due process, (*see, Scott v. United States*, 419 F.2d 264, 274 [D.C. Cir. 1969]; *cf. North Carolina v. Pearce*, 395 U.S. 711, 723-724 [1969]; *United States v. Wiley*, 267 F.2d 453 [7th Cir. 1959]), the record belies the assertion that any such policy motivated the judge's comments here.

At the close of the *Wade* hearing, the District Attorney had apparently indicated that he would no longer consent to a guilty plea to a reduced charge (App. 28.)[17] The plea offer extended to the petitioner by the judge, therefore, called for a 6 to 12 year sentence for robbery in the first degree. Hence, the judge was offering to impose a sentence of less than half the maximum for an armed robbery — this in direct contrast to the strict policy he later claimed he followed.

Finally, after reading what he obviously thought of as a very unflattering probation report, (App. 30-33.), the judge observed:

> . . . The [petitioner] shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, *I feel that six to twelve is enough time for this man to receive.* (App. 33.) (Emphasis is supplied.)

Hence it is manifestly clear that the 12½ to 25 year sentence was simply a device employed by the judge to

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[17]In New York, the District Attorney's consent is required whenever a guilty plea is offered unless the plea is to each count of the indictment as charged. (*See*, N.Y. Crim. Pro. L., *supra*, Sec. 220.10[3]-[5] [McKinney's Supp. 1977]).

induce the unwilling petitioner to plead guilty, for it was more than twice the term the judge actually thought appropriate even in view of the petitioner's background and the nature of the crimes charged. A judge may not be permitted to employ his sentencing power in this fashion. *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966); *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973).

We have recently learned that a prosecutor may induce a defendant to plead guilty by threatening that, if he does not, additional charges to which he would properly be subject will be filed. *Bordenkircher v. Hayes*, 434 U.S. 375, 365 (1978). However, that result follows from the fact that "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial" and that in " 'the give-and-take negotiation common in plea bargaining between the prosecution and defense, [both] arguably possess relatively equal bargaining power.' *Parker v. North Carolina*, 397 U.S. 790, 809 (opinion of BRENNAN, J.)" *Id.* at 362-363.

In contrast a trial judge has no constitutionally legitimate reason for wanting a particular defendant to avoid trial, and he most certainly does not occupy a bargaining position even arguably equal with that of the defendant who stands before him for trial. "Our concept of due process must draw a distinct line between, on the one hand, advice from and "bargaining" between defense and prosecuting attorneys and, on the other hand, discussions by judges who are ultimately to determine the length of sentence to be imposed." *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319-320 (2nd Cir. 1963) (MARSHALL, then

Circuit Judge, dissenting). *See, also, Schaffner v. Greco*, ____ F. Supp. ____ (S.D.N.Y. 1978) (77 Civ. 281, decided 10/20/78) (Lasker, D.J.) slip opn. p. vi-vii, n. 16.

When, as here, a trial judge threatens the imposition of a significantly harsher sentence upon conviction after trial in order to induce a guilty plea, he engages in conduct having the sole objective of discouraging the assertion of a constitutional right. His conduct is therefore "patently unconstitutional," (*Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 n.20 [1973]), and any guilty plea that it produces cannot stand.

Because the petitioner's guilty plea was produced by a blatant and unconstitutional judicial threat, it must be set aside.

C. THE PETITIONER'S GUILTY PLEA WAS INVOLUNTARY AND IS THEREFORE VOID.

Even if this Court finds that neither the participation of the trial judge nor the nature of the particular comments he made requires reversal *per se*, the petitioner's guilty plea must nevertheless be vacated because the record amply demonstrates that it was involuntary.

After having heard a prosecution witness identify him as the perpetrator of the crime, (App. 51-52.), the petitioner nevertheless rejected the plea offer carrying a 6 to 12 year sentence. He changed his mind and decided to accept the very same offer only after the trial judge's warning had been relayed to him. The guilty plea, therefore, was not a calculated and voluntary response to the petitioner's

assessment of the strength of the prosecution's case or the probabilities of his success at trial. *Cf. Brady v. United States*, 397 U.S. 742, 743, 756 (1970). *United States v. Tateo*, 214 F. Supp. 560, 566-567 (S.D.N.Y. 1963). Instead, it represented a surrender to an overpowering judicial threat made against him at a time when he may well have been unsettled by the damaging evidence just adduced and therefore most vulnerable to strong inducement. *United States v. Tateo, supra*, at 565. *See, also, Schaffner v. Greco*, ___ F. Supp. ___ (S.D.N.Y. 1978) (77 Civ. 281 decided 10/20/78) (Lasker, D.J.), slip opn. at 7. Moreover, the judge's threat was the only event intervening between the petitioner's flat rejection of the 6 to 12 year offer and his acceptance of it moments later. *Cf. United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting).

This Court has said that:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . .

Brady v. United States, 397 U.S. 742, 755 (1970) quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, C.J., dissenting), *rev'd en banc* 246 F.2d 571 (5th Cir. 1957) *rev'd on confession of error* 356 U.S. 26 (1958). The petitioner swore that his change of plea had been the direct result of the judge's threat. (App. 14-15.) The person closest to him during the proceedings, his trial counsel, told the court: "I think your Honor in light of everything, that [the warning] was the basis of why the [petitioner] took the plea." (App. 28.) The record fully

supports that view. *Cf. Brown v. Peyton*, 435 F.2d 1352, 1357 (4th Cir. 1970) (Winter, C.J., dissenting), *cert. denied*, 406 U.S. 931. The petitioner's perfunctory statement during the plea allocution that his guilty plea was not involuntary can be given little weight in view of what is now known to have preceded it. *Scott v. United States*, 419 F.2d 264, 274 (D.C. Cir. 1969) (Opinion of Bazelon Ch. J.). *Cf. Haley v. Ohio*, 332 U.S. 596, 601 (1948).

Whenever the voluntariness of a guilty plea is in issue, considerations of a defendant's guilt or innocence are irrelevant. *E.g., United States v. Tateo*, 214 F. Supp. 560, 564 (S.D.N.Y. 1963). "No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty — that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon a defendant such alternatives amounts to coercion as a matter of law." (*Id.* at 567, footnotes omitted.) *Cf. Williams v. Florida*, 399 U.S. 78, 111-114 (1970) (Opinion of BLACK, J., in which DOUGLAS, J., joined); *Byrd v. United States*, 377 A.2d 400, 405 (D.C. App. 1977). "In the area of plea bargaining, the lodestar must be the realization that our law solemnly promises each man accused his day in court." *Scott v. United States*, 419 F.2d 264, 277 (D.C. Cir. 1969) (Opinion of Bazelon, Ch. J.).

The petitioner's day in court was denied to him by the blatantly coercive conduct of the trial judge. Because all the relevant circumstances surrounding the guilty plea indicate beyond question that the petitioner surrendered his constitutional right to stand trial only because the trial judge threatened him with a maximum sentence, the guilty plea must be held involuntary and therefore void.

CONCLUSION

The petitioner's guilty plea was the direct product of the coercive and unconstitutional participation by the trial judge in the plea bargaining process. Therefore, the plea was involuntary and must be declared void.

The order of the Appellate Division below should be reversed and the case should be remanded to that court with instructions to vacate the guilty plea and remand the case to Supreme Court, Kings County, for trial.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

against

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT

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—o—

BRIEF FOR RESPONDENT

Question Presented

Whether petitioner's counseled plea of guilty was obtained in violation of due process because the trial judge, after one disposition had been rejected and testimony at the *Wade* hearing had been completed, advised petitioner, through his counsel, of the range of sentencing alternatives if he proceeded to trial or pleaded guilty.

Statement of the Case

Harold Ramsey, the petitioner, was convicted of the crime of robbery in the first degree and sentenced to a term of imprisonment of six to twelve years. He now seeks to have his counseled plea of guilty, upon which the conviction rests, vacated on the ground that it was coerced.

Petitioner's present involvement with the law began on January 20, 1975, with his arrest in Kings County for two robberies (App. 14). He was subsequently accused by Kings County Indictment Numbers 431/75 (App. 38-40) and 2588/75 (App. 2-4), of the crime of robbery in the first degree (six counts) and several lesser included offenses.[1] A co-defendant was named in the first indictment (App. 38-40); it was alleged in the second indictment that petitioner acted alone (App. 2-4).

A year and nine months elapsed between petitioner's arrest and sentencing. During that time, he underwent several psychiatric examinations and was found fit to proceed.[2] Petitioner also pleaded guilty twice after the indictments were consolidated for disposition and was permitted by the court to withdraw his plea once. Petitioner was represented by counsel throughout the proceedings. In fact, he had four different attorneys, all of whom were appointed by the court.

[1] N.Y. Penal Law § 160.15 (McKinney 1975) provides in relevant part that:

> A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> * * *
>
> 3. Uses or threatens the immediate use of a dangerous instrument; or
>
> 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm;
>
> * * *
>
> Robbery in the first degree is a class B felony.

If convicted, as a second felony offender, petitioner faced a more substantial penalty than a first offender. Pursuant to N.Y. Penal Law § 70.06(3)(a), (4) (McKinney 1975), if convicted of robbery in the first degree, petitioner faced sentences ranging from four and one-half years to nine years up to twelve and one half years to twenty-five years.

In 1975, petitioner was examined by psychiatrists four times pursuant to court order: three times to determine his fitness to proceed (App. 76-81; 82-87; 88-95) and once in aid of sentence (App. 98-104). A report by the Probation Department, based upon its interviews with petitioner, was submitted to the court after the first plea of guilty (App. 96-97). In April, 1975, petitioner was found "unfit to proceed" because of his ". . . failure to participate in the psychiatric evaluation . . ." (App. 85), and because he " . . . verbalized suicidal ideas . . ." (App. 92). However, he was found "fit to proceed" in June, 1975 (App. 84-87).

In general, the several reports outlined petitioner's criminal past (App. 80, 86, 95, 102) and revealed a persistent pattern of anti-social behavior manifesting a contempt for authority and law (App. 80-81, 86 and 87, 102 and 104). His difficulties were premised on a tragic childhood and adolescence which included a violent family life, drug abuse, and placement at the Willowbrook State School following a mistaken diagnosis of retardation (App. 80-81, 94, 96-97, 103). One report concluded that petitioner suffered from an unspecified psychosis (App. 81).

[2] N. Y. Crim. Pro. Law Article 730 (McKinney 1971) prescribes the procedure to be followed in evaluating an accused's fitness to proceed.

In the reports, petitioner was described as a manipulator (App. 80) and a malingerer (App. 92). For example, the examining psychiatrists noted that petitioner "... appears to be a rather 'street wise' individual ..." (App. 80), and that his "... present behavior is associated with his dislike of incarceration and the likelihood that with all his years in prison he has acquired the correct answers to give psychiatrists." (App. 81). In another report, after concluding that he was fit to proceed, the doctors stated "[a]t the present time (petitioner) seems to be malingering a psychiatric condition." (App. 92). And in a third report, the examining psychiatrist observed that petitioner "... spoke spontaneously, there is [sic] no unstable symptoms of emotional or mental disturbance on his part; the manner in which he spoke, as well as words, suggest artifice or affection of illness." (App. 94). Petitioner's intelligence was described as "about average or dull-normal." (App. 104).

On September 8, 1975, Kings County Indictment Numbers 431/75 and 2588/75 were consolidated for disposition and petitioner "confirmed" the finding in the latest psychiatric evaluation (July, 1975) that he was fit to proceed (App. 42). Petitioner then offered to plead guilty to the third count of Kings County Indictment Number 431/75, charging robbery in the second degree, a class "C" felony (N.Y. Penal Law § 160.10 (McKinney 1975) (App. 39). The plea was accepted by Honorable Larry M. Vetrano, (App. 44), after petitioner acknowledged that he understood the legal consequences of his plea and that it was voluntarily offered (App. 43), and after he admitted his commission of the crime charged (App. 43). The court conditionally promised to sentence petitioner to a term of

imprisonment of three and one-half years to seven years (App. 43).[3]

On the 19th of December, 1975, petitioner's application to withdraw his plea of guilty was granted by Mr. Justice Vetrano (App. 1). Prior to making the application, petitioner told a medical examiner that " 'I'm taking my plea back', he complained that he had been 'railroaded'. He gave the examiner to believe that he had committed no crime." (App. 43).

Both cases were transferred to Criminal Term, Part 52, where, on August 3, 1976, Honorable Gerald S. Held, J.S.C., conducted a *Wade* hearing[4] on Indictment Number 2588/75 (App. 1, 49-75). The District Attorney called one witness, Mrs. Rebecca Walker, who testified that on the 30th of December, 1974, at approximately 8:30 P.M., petitioner robbed her and other persons, who were in a beauty parlor, at gunpoint (App. 50-51). The lighting conditions in the store were good ("much brighter than ... in the courtroom ...") (App. 52), and petitioner's "... face was towards (Mrs. Walker) all along ..." during the incident, which lasted five to ten minutes (App. 53, 67). At one point, petitioner "... came ... right up to (her)" for two or three seconds (App. 53).

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[3] As a second felony offender, the minimum sentence available to petitioner was three years to six years (*see*, N.Y. Penal Law § 70.06 (3) (b), (4) [McKinney 1975]).

The conditional promise resulted from a bench conference between the court and defense counsel concerning a disposition of petitioner's cases (App. 43). Petitioner was advised that if the court could not keep its promise because of an unfavorable probation report, he would be permitted to withdraw his plea and proceed to trial. (App. 43).

[4] *See, United States* v. *Wade*, 388 U.S. 218 (1976); and, N.Y. Crim. Pro. Law Section 710.20 (5) (McKinney's Supp. 1977).

Mrs. Walker also testified that she had seen petitioner in the neighborhood on two occasions a few weeks before the robbery (App. 51, 53-54, 55, 56, 60, 61, 62).[5] On each occasion she saw his face and insisted that "(t)wenty years from now I will still remember his face." (App. 64.)[6]

The next day, Indictment Number 431/75 was consolidated into Indictment 2588/75, and petitioner offered to plead guilty to the charge of robbery in the first degree. Mr. Justice Held promised to sentence petitioner to a term of imprisonment of six years to twelve years.

In response to Mr. Justice Held's inquiry, petitioner unhesitatingly acknowledged that he understood the legal consequences of his plea (App. 6-7), including the waiver of ". . . the identification hearing which we have completed but which I (the court) have not ruled upon . . ." (App.7); that he was not "forced", "threatened", or "convinced" to plead guilty; and, that he "(is) pleading guilty because (he is) guilty and because (he is) voluntarily doing it . . ." (App. 7). Petitioner also acknowledged that his counsel (John Avanzino, Esq.) had explained his rights to him and that he was "satisfied with (counsel's) legal services . . ." (App. 7).

The terms of Mr. Justice Held's sentence promise were explained to petitioner and he indicated his understanding of them (App. 7-8). He also indicated that he was " . . . totally reliant on (the court's) promise and (the court's) promise only . . ." (App. 8).

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[5] Mrs. Walker saw petitioner for the first time six weeks before the robbery.

[6] At the close of Mrs. Walker's testimony, the prosecution rested. The court adjourned the hearing for one day to enable defense counsel to produce a witness (an investigator) to "contradict" Mrs. Walker's testimony concerning a photographic identification of petitioner (App. 73-74, 75). However, no testimony was taken on the return date and, indeed, there is no evidence in the record that the witness was even present in court.

A factual basis for the plea was developed in the record. Petitioner admitted that on December 30, 1974, he stole at gunpoint approximately $150 from patrons and employees of a beauty parlor (App. 8-9). He also admitted that on the 20th of January, 1975, he and another person, who he knew had a weapon, went to a store intending to commit a robbery. There, they forcibly took money from a "(p)erson and drawer." (App. 9).

Petitioner's statement concerning his complicity was ". . . truthful . . . made of (his) free will and accord and (was) . . . complete and full . . ." (App. 8). At no time during the plea proceeding did petitioner assert his innocence or claim that his plea was induced by the court's alleged threat to impose the maximum sentence if found guilty by a jury. The plea was accepted, and petitioner was remanded (App. 10).

On September 17, 1976, petitioner was produced in court for sentencing (App. 18). At the outset, counsel reminded Mr. Justice Held about petitioner's application to withdraw his plea of guilty, which the court noted was being "advanced" (App. 18-19). Petitioner was first adjudicated a "prior predicate felon" (App. 19-21).

The application to withdraw the plea of guilty, dated September 10, 1976, was supported by petitioner's and defense counsel's affidavits (App. 12-17). Petitioner claimed for the first time that he pleaded guilty to crimes he did not commit because of the information he received after the *Wade* hearing from his attorney that the court would sentence him to a term of imprisonment of twelve and one-half years to twenty-five years if convicted after a trial, and because he was "wearied" by his pretrial incarceration (App. 14-15). Petitioner also noted that the day preceding the *Wade* hearing, he was offered a sentence of three and one-half years to seven years, which he rejected because he

was innocent (App. 14). Defense counsel corroborated petitioner's allegations concerning the terms of the plea offers (App. 16) and added that ". . . since the inception of my assignment to defend him (July 23, 1976—twelve days before the plea) the (petitioner) has maintained his innocence. . ." (App. 16).

As part of his response to the application, Mr. Justice Held read portions of the plea proceeding into the record which evidenced petitioner's understanding of, and satisfaction with, the proceeding and the disposition of the two indictments. The portions read also evidenced the voluntary nature of the plea (App. 22). In addition, the court read into the record petitioner's admissions that he committed the robberies charged in the indictments (App. 23-24). At the conclusion of this review, the court asked petitioner if he had lied at the taking of the plea. He responded, "Yes, I am telling you this. You want to let me talk now?" (App.. 24).

At this point, the court's efforts to elicit responses from petitioner became fruitless. He became abusive, often resorting to profanity (App. 24-25), and accused the court of intimidating his lawyer ". . . in front of . . . the jury. . ." (App. 24). Petitioner vehemently protested his innocence and insisted that,

> [t]he only reason I took my plea is because I was coerced.
>
> You also told my attorney if I have a trial, you will give me twelve to twenty-five years, and he told me that.
>
> • • •
>
> You also started making remarks about a mess of people in the beauty parlor and you already had me tried and convicted.

> You said that is my line of work.
>
> When my lawyer said to you that he was ready, we came to the courtroom and you asked my attorney, and he said yes, and you said you are going to trial, and my attorney said yes, and you said I guess your client is innocent.
>
> You are motherfucking right I am innocent. (App. 25) [7]

The repeated admonition to petitioner concerning the use of profanity after this last outburst only encouraged him to further bait Mr. Justice Held. He said: "Then take the handcuffs off. . . .If you are a man, take them off." (App. 25). Petitioner was summarily adjudged in criminal contempt and sentenced to thirty days in jail (App. 25, 26).[8]

In response to further questioning, petitioner stated that, though he lied to the court at the taking of the plea (App. 25), ". . . now . . . I am telling the truth." (App. 25-26). Mr. Justice Held then asked petitioner "(h)ow am I to tell the difference since you are admittedly a liar? (App. 26). Petitioner responded:

> I am innocent and the only reason took the plea is because you are prejudice (sic). . . . I know I cannot get a fair trial from you, and I definitely don't trust you. It is impossible to get a fair trial in front of you. (App. 26).

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[7] Respondent disagrees with petitioner's observation that he resorted to profanity and invective when "it became clear" that his application to withdraw his plea of guilty would not be "seriously" considered by Mr. Justice Held (*Petitioner's Brief* at p. 9, n.6), To the contrary, we think the record supports the conclusion that the court made every reasonable effort to test the veracity of petitioner's allegations. In any event, petitioner's explanation is no justification for his behavior.

[8] The court ordered petitioner to first serve the thirty day sentence (App. 33, 105-106).

The court denied the application and petitioner continued to antagonize Mr. Justice Held by the use of profanity and invective (App. 26). Petitioner was gagged [9] and the circumstances surrounding the plea were reconstructed by the court and defense counsel.

Mr. Avanzino recalled that, prior to the *Wade* hearing and the selection of the jury, he had a conversation with the court and the prosecutor concerning a disposition. Specifically, the original agreement which petitioner accepted a year earlier, *viz:* a plea to robbery in the second degree in return for a sentence of three and one-half years to seven years, was resurrected. Mr. Justice Held added the proviso that the sentence promise was "... subject, of course, of me (sic) looking at the probation report." (App. 27). Petitioner rejected the offer conveyed to him by counsel and "... indicated ... that he was innocent ..." (App. 27).

After the People rested at the *Wade* hearing, the court offered a plea to defense counsel to robbery in the first degree in return for a sentence promise of "... six to twelve years with the District Attorney's approval." The following reconstruction of events appears in the record:

> Mr. Bavanzino (sic): It was a Miss Walker ... and it was the only one that took the stand, and after that witness, there was some talk about a plea of guilty, and at that time ... the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.
>
> I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.

[9] The restraint was obviously not excessive since petitioner was able to remove the gag and speak moments later (App. 27, 29).

* * *

We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.

Your Honor told me to take that back to my client which at that time I did, Judge. *I gave him that warning.*

The Court: *Subject of course of me (sic)* reading *the probation report. It is a practice in my court when there is an armed robbery, to give ... a maximum sentence, unless there are mitigating circumstances.*

Mr. Bavanzino (sic): Well, I think your Honor in light of everything, that was the basis of why the (petitioner) took the plea. (App. 28) (Emphasis added).

Counsel conceded that "(w)hen (petitioner) pleaded guilty ... (he) assumed as your Honor did that (petitioner) was guilty." (App.28). However, he also noted that before the entry of the plea, the defense was ready for trial, and a jury had been selected (App. 28).

Mr. Justice Held again denied the application and proceeded with the sentencing.[10] He read into the record petitioner's probation report, which the court had previously reviewed. (App.30). The report indicated that petitioner, who was then twenty-four years old, had a juvenile delinquency record dating back to 1965 (App. 30). Seven months after his release, petitioner was adjudicated a

[10] Petitioner was gagged again and handcuffed to his chair because of his disruptive behavior (App. 29-30).

Youthful Offender[11] for an attempted grand larceny and related offenses. In 1971, he was convicted of robbery in the third degree (App. 31). As a parolee and a predicate felon, petitioner committed the crimes which were the subject matter of his plea (App. 31).

The probation report included the reasons given by petitioner for pleading guilty. First, he claimed that he was "beat up" by the arresting officer (App. 31).[12] Second, petitioner ". . . accepted the plea for the purposes of his own convenience as well as he feared conviction if he were found . . . guilty at trial." (App. 31). Third, petitioner ". . . only pleaded guilty on the advise [sic] of his lawyer, and was tired of being in jail." (App. 32). Fourth, petitioner pleaded guilty because the court's ". . . decision at a *Wade* hearing was prejudicial . . ." and because the court ". . . was prejudicing the jury during the time of selection." (App. 32).[13] Fifth, petitioner complained that he was unable to change judges and feared the imposition of the maximum sentence if convicted after a trial (App. 32).

Petitioner's reasons for wanting to withdraw his plea of guilty were also discussed in the probation report. First, petitioner stated that he did not commit the crimes charged in the two indictments (App. 31, 32). Second, petitioner

[11] *See,* N.Y. Crim. Pro. Law Article 720 (McKinney's Supp. 1977) and N.Y. Penal Law Section 60.02 (McKinney 1975).

[12] The District Attorney is in possession of no evidence to support this allegation, nor has any been proffered by petitioner.

[13] The court in fact never ruled on the motion. This was acknowledged by petitioner at the taking of the plea (App. 7) and by defense counsel at the sentencing (App. 32). With regard to the court's "prejudicing the Jury", Mr. Justice Held observed that ". . . at the time the appeal is taken from sentence, a copy of the voir dire should be ordered so that the Appellant [sic] Court will see whether or not that is the case" (App. 32). A transcript of the voir dire was not submitted by petitioner to the Appellate Division as part of the record on appeal.

felt that the court's sentence promise was excessive ". . . especially so because his co-defendant in indictment 431 of 1975 was sentenced to two years to four years." (App. 32). However, petitioner added that ". . . three and a half to . . . seven years would be acceptable to him and he is considering to withdraw [*sic*] his plea if your Honor follows through with the promise of six years to twelve." (App. 32).

The court briefly adverted to petitioner's psychiatric history and concluded the review of the probation report by noting petitioner's stated belief that he was a victim of the criminal justice system as well as *the* victim of the crimes he had committed (App. 32-33). Petitioner was then sentenced as promised to a term of imprisonment of six to twelve years.

On the 10th of October, 1978, certiorari was granted by this Court, and the question presented for review is whether petitioner's counseled plea of guilty was obtained in violation of due process.

Summary of Argument

Though a pervasive practice for many years (*see* D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (1966); and, Comment, *People* v. *Selikoff, The Route to Rational Plea Bargaining* 21 Cath. Lawyer 144, 145 n.4 (1975)), plea bargaining only recently received its imprimatur from this Court (*see, Blackledge* v. *Allison,* 431 U.S. 63 (1977)). The present controversy concerns the proper role to be played by the trial court in this process. It is respondent's submission that the trial court may directly participate in plea negotiations without violating due process.

The participation of the judge in plea negotiations, whether or not he later presides at trial, is consistent with due process when conducted in open court in the presence of the prosecutor, and defense counsel and his client, and when the proceedings are transcribed for appellate review (*see, generally, Blackledge* v. *Allison,* 431 U.S. 63, 76-77 (1977)). The court's participation serves the salutary purpose of insulating the accused from the possible overreaching of the prosecutor, whose adversarial role may discourage the formulation of an agreement which serves the interests of both the defendant and the State (*see,* Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509, 515, 517 (1971)).

The record and defense counsel protect the accused from an overbearing judge. Any improprieties in the proceedings will be readily discernible in the record (*see, e.g., United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959); *People* v. *Williams,* 46 App. Div. 2d 783, 360 N.Y.S.2d 453 (2nd Dept. 1974); and, *People* v. *Dennis,* 28 Ill. App. 3d 74; 328 N.E.2d 135 (1975)). Defense counsel will not only protect and amplify the record (*see, United States ex rel. McGrath* v. *LaVallee,* 348 F.2d 373, 376 (2nd Cir. 1963), *cert. denied* 383 U.S. 952 (1967)), but will dissipate the allegedly coercive atmosphere created by the presence of the judge (*see, generally, Miranda* v. *Arizona,* 384 U.S. 436, 461, 466 (1966); and *Brady* v. *United States,* 397 U.S. 742, 753-754 (1970)).

In our view, the atmosphere created by the participation of the judge, when properly regulated, will be conducive to candor and fairness. "It is the errant judge, not judicial participation in general that is coercive." (Comment, *New Federal Rule of Criminal Procedure* 11(e): *Dangers In Restricting the Judicial Role In Sentencing Agreements,* 14 The Am. Crim. L. Rev. 305, 311 n.32 (1976)).

The participation of the trial judge, moreover, does not compromise his ability to preside impartially at trial. Judges are frequently exposed to information which is at least as prejudicial as a defendant's participation in plea negotiations or his offer to plead guilty. A court may suppress evidence which conclusively establishes the movant's guilt or may have presided at the defendant's first trial which was reversed on appeal. Due process does not prohibit the court from presiding at trial in either example, nor does due process require a finding that the defendant's plea of guilty was involuntary because he believed that the court could no longer be imparital (*see, e.g., Withrow* v. *Larkin,* 421 U.S. 35, 49, 56 (1975); and, *Ungar* v. *Sarafite,* 376 U.S. 575, 584-588 (1964)).

A distinction has been drawn by this Court between conduct which is "patently unconstitutional" and conduct which "encourages" a plea of guilty (*see, Corbitt* v. *New Jersey,* U.S. (Decided December 11, 1978; No. 77-5903) slip opinion at 5-6). In our view, Mr. Justice Held's sentence statement falls within the latter category. Without commenting on the strength of the evidence or offering advice, Mr. Justice Held offered petitioner, through counsel, lenient treatment consistent with the policies underlying the encouragement of pleas (*see, Id.,* at 10-11). *If* convicted after trial, the defendant would be accorded every consideration consistent with the lawful exercise of the court's sentencing prerogatives. The court never committed itself to a maximum sentence in the event of conviction after trial; a commitment was made concerning the sentence to be imposed upon a plea of guilty (*compare, e.g., Murray* v. *United States,* 419 F.2d 1076 (10th Cir. 1969); *Euziere* v. *United States,* 249 F.2d 293 (10th Cir. 1957); and *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963)).

Mr. Justice Held simply did not " 'deliberately employ (his) charging and sentencing powers to induce (the petitioner) to tender a plea of guilty', . . . with the 'objective (of) penaliz(ing) (his) reliance on his legal right . . .' " (*Corbitt* v. *New Jersey* (Decided December 11, 1978; No. 77-5903) dissenting opinion at 5 n.7).

Objectively viewing all the circumstances relevant to the taking of the plea (*see, e.g,. Brady* v. *United States,* 397 U.S. 742, 749 (1970); and, *Toler* v. *Wyrick,* 563 F.2d 372, 373 (8th Cir. 1977), *cert. denied,* 98 S. Ct. 1455), we think that the record establishes that petitioner, who was at all times represented by able counsel and was himself experienced in the criminal law and procedure, was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and his desire to avail himself of a more lenient sentence. When viewed in the proper context, the court's statement concerning the range of sentencing alternatives, conveyed to petitioner by counsel, could not have had the effect he now ascribes to them. What emerges from the record is a shrewd and experienced plea bargainer rather than an intimidated and coerced victim of an overbearing judge. Accordingly, his conviction should be affirmed.

ARGUMENT

Petitioner's counseled plea of guilty was voluntarily entered. The active participation of the trial judge in the plea bargaining process does not require that petitioner's plea be set aside. The record amply supports the conclusion that the plea was a voluntary and intelligent choice among the alternative courses of action open to petitioner. Therefore the order of the Appellate Division should be affirmed.

Petitioner urges this Court to set aside his counseled plea of guilty on the ground that it was coerced by the active

participation of the trial judge in the plea negotiations. To support his application for relief, petitioner contends that the active participation in the negotiations by the judge assigned to try the case renders *every* plea involuntary. Alternatively, petitioner applies the "patently unconstitutional conduct" and "totality of the circumstances" tests to establish the due process violation essential to the setting aside of his plea. We submit, that, notwithstanding the trial judge's active participation in the plea negotiations, petitioner's plea of guilty was voluntary. Consequently, the order of the Appellate Division should be affirmed.

A. The Active Participation of the Trial Judge in the Plea Bargaining Process.

Petitioner's first challenge to the constitutionality of his plea focuses on the trial judge's active participation in the plea bargaining process which, he contends, taints every plea. However, he accepts, as constitutionally permissible, the active participation of a judge other than the judge to whom the case has been assigned for trial, since both the possibility and fear of judicial impartiality at trial would be eliminated. Apparently, a statutory scheme permitting a trial judge to either ratify or reject a plea agreement between the prosecutor and the defendant (*see, e.g.,* Fed. R. Crim. T. 11(e)(1)), would also be acceptable to petitioner since it is the active participation of the judge presiding at trial which is central to petitioner's challenge.

Concern over the proper role to be played by the court in the plea bargaining process has generated a considerable amount of commentary. The general consensus of opinion appears to favor the prohibition of direct judicial partici-

pation.[14] In addition, judicial participation is prohibited by statute in the federal district courts, as well as in the courts of nine states and the District of Columbia.[15] Criticism or outright prohibition of this practice may also be found in the case law—both federal and state.[16]

[14] *See, e.g.,* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, § 3.3(a) (App. Draft 1968); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 779, 51 A.B.A.J. 444 (1965); ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(1) (1975); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURT'S REPORT, § 3.7 (1973); NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 441(a) (1974); Gallagher, *Judicial Participation in Plea Bargaining: A Search For New Standards,* 9 HARV. C.R. & C.L.L. REV. 29 (1974); Note, Judicial Participation in Guilty Pleas—A Search For Standards, 33 U. PITT. L. REV. 151 (1971); White, *A Proposal For Reform of the Plea Bargaining Process,* 119 U. PA. L. REV. 439, 452-453 (1971); Note, *Judicial Plea Bargaining,* STAN. L. REV. 1082 (1967); Note, *Official Inducements to Plead Guilty: Suggested Morals For a Market Place,* 32 U. CHI. L. REV. 167, 180-181 (1964).

[15] Fed. R. Crim. P. 11(e)(1); Arizona (Ariz. R. Crim. P. 17.14(a) (1973)); Arkansas (Ark. R. Crim. P. 25.3 (1977); Colorado (Colo. Rev. Stat. Ann. § 16-7-302 (1974), Colo. R. Crim. P. 11(f)(1)); District of Columbia (D.C.C.E.S.C.R. Crim. R. 11(e)(1) (West Supp. 1977-78)); New Jersey (New Jersey Court Rules 3:9-3(a) (West 1978)); New Mexico (N.M. Stat. Annot. § 41-23-21(g)(1) (1974); North Dakota (N. Dak. R. Crim. P. 11(d)(1)); Oregon (Ore. Rev. Stat. § 13.432(1) (1974); Pennsylvania (Pa. R. Crim. P. 319(b)(1) (Purdon's 1978); and, South Dakota (S. Dak. Cod. Laws Annot. 23A-7-8, Rule 11(e)(1) (eff. July 1, 1979)).

[16] *See, e.g., United States* v. *Werker,* 535 F.2d 198 (2nd Cir. 1976), *cert. denied,* 429 U.S. 926 (1976); *Griffith* v. *Wyrick,* 527 F.2d 109, 111 n.2 (8th Cir. 1975); *United States* v. *Gallington,* 488 F.2d 637, 640 (8th Cir. 1973), *cert. denied,* 416 U.S. 907 (1974); *Scott* v. *United States,* 419 F.2d 264 (D.C. Cir. 1969); *Brown* v. *Beto,* 377 F.2d 950, 956, 957 (5th Cir. 1967); *United States* v. *Cariola,* 323 F.2d 180, 187 (3rd Cir. 1963); *Gordon* v. *State,* 577 P.2d 70 (Sup. Ct. Alaska 1978); *People* v. *Clark,* 183 Colo. 201, 515 P.2d 1242 (1973); *State* v. *Gummieny,* 568 P.2d 1194 (S. Ct. Hawaii, 1977); *Anderson* v. *State,* 263 Ind. 583, 335 N.E.2d 225 (1975); *State* v. *Byrd,* 203 Kan. 45, 453 P.2d 22 (1969); *People* v. *Bennett,* 269 N.W.2d 618 (Ct. App. Mich. 1978), and *People* v. *Earegood,* 12 Mich. App. 256 162 N.W.2d 802 (Ct. App. Mich. 1968), *rev'd* 383 Mich. 82, 173 N.W.2d 205 (1970); *Rogers* v. *State,* 243 Miss. 219, 136 So.2d 331 (1962); *Mesmer* v. *Rains,* 351 P.2d 1018 (Okla. Cr. 1960); *Commonwealth* v. *Evans,* 434 Pa. 52, 252 A.2d 689 (1969); and *Ex parte Shuflin,* 528 S.W.2d 610 (Tex. Crim. App. 1975).

There is, however, a discernible trend emerging from the commentaries which favors an expanded judicial role, if not the complete control of the plea bargaining process by the courts.[17] Moreover, statutes governing the plea procedures in four states permit active judicial participation.[18] Some states, *e.g.,* New York (N.Y. Crim. Pro. L. Art. 220 (McKinney's Supp. 1977-78)), Maine (R. Crim. P.11 (West 1978)), and Louisiana (West's La. C. Crim. P. Art. 552, *et. seq.* (Supp. 1978)), have elaborate rules governing plea procedures, none of which expressly proscribe judicial participation.[19]

[17] *See, e.g.,* Approved Draft of the Standing Committee on American Bar Association Standards for Criminal Justice, § 14-3.3(c),(e), permitting the court to act as a "moderator" at the plea conference held at the request of both sides and to advise the parties as to what disposition would be acceptable to the court, or to inquire of the parties where they have neither advised the judge of a plea agreement nor requested to meet for plea discussion purposes, whether disposition without trial has been explored and to allow an adjournment to enable plea discussions to occur; Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059 (1976); Comment, New Federal Rule 11(e): *Dangers In Restricting The Judicial Role In Sentencing Agreements,* 14 THE AM. CRIM. L. REV. 305 (1976); Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286 (1972); Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509 (1971).

[18] Florida (Fla. R. Crim. P. 3.170-3.171 (Lawyers Coop. 1973) (committee notes)); Illinois (Ill. Annot. Stat. Ch. 110A, § 402 (Smith-Hurd, 1976)) North Carolina (N.C. Gen. Stat. § 15A-1021(a)); and, Vermont (Vt. R. Crim. P. 11(e)(1)). The courts in Rhode Island (*State* v. *Welch,* 112 R.I. 321, 309 A.2d 128, 133-134 (1973)) and Florida (*State* v. *Davis,* 308 So.2d 27, 29 (Sup. Ct. Fla. 1975)) apparently encourage judicial participation.

[19] In Kings County, New York, a special Conference Part has been established for pre-trial plea discussions to be conducted by a judge who does not preside at trials. (*See* N.Y. Ct. R. § 751.3(1) (McK. Consol. Laws of N.Y. 1977), and Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1090 n. 98 (1976)). Under this system, an accused has two chances to obtain a "favorable" disposition.

While the Kings County experiment may be unusual, the commentators agree that judicial plea bargaining is pervasive (*See, e.g.,* Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509, 514-515 (1971); Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1061-1062, 1149-1150, 1151-1152 (1976)).

This Court, however, at least tacitly approved some degree of judicial participation in *Brady* v. *United States,* 397 U.S. 742, 755 (1970), *citing, Shelton* v. *United States,* 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd* 356 U.S. 26 (1958), and has expressly approved the offer of substantial benefits to *encourage* pleas (*Corbitt* v. *New Jersey,* — U.S. — (Decided December 11, 1978; No. 77-5903) slip opinion at p. 6). We submit that the direct participation of *any* judge in the plea negotiations, whether or not he will preside at trial, does not, standing alone, violate due process.

First, the argument that judicial plea bargaining is more coercive than prosecutorial plea bargaining, because of the court's sentencing power, is sound only as a matter of legal theory. The practice in this country compels a different conclusion. As noted in one commentary:

> Although the prosecutor may not possess the power and prestige of the judge, from the vantage point of the defendant his influence may be more threatening. The prosecutor . . . has various means not available to the judge to exert pressure upon the defendant: *i.e.,* the power to press charges against the accused's family or friends, the power . . . to decide which counts to prosecute, and the power to recommend sentences (which, in those jurisdictions where the judge normally follows the the prosecutor's recommendations is equivalent to the power to fix sentences). Since the 'disparity of position,' in terms of coercive impact on the defendant, may in many instances be greater between the prosecutor and the accused, the validity of an absolute distinction between judge and prosecutor inducements on grounds of coercive effect and voluntariness is open to doubt. (Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination,* 6 Am. Crim. L. Rev. 187, 192 (1968), cited in Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 Colum. L. Rev. 1059, 1107 n. 165 (1976). *See,* Note, *Judicial Plea Bargaining,* 19 Stan. L. Rev. 1082, 1085-1086, 1088-1089 (1967); and, Note, *Restructuring the Plea Bargain,* 82 Yale L.J. 286, 305 (1972).[20]

In a similar vein, it is well-known that an accused who pleads guilty will receive a lighter sentence than if he is convicted after a trial (*see, e.g., Brady* v. *United States,* 397 U.S. 742, 751 (1970); *Dewey* v. *United States,* 268 F.2d 124, 128 (8th Cir. 1959); and, *People* v. *Melton,* 35 N.Y.2d 327, 330, 320 N.E.2d 622, 361 N.Y.S.2d 877 (1974)). Moreover, a particular judge's sentencing policies soon become well-known to the defense bar as well as to defendants, either through their own experiences or through conversations with their lawyers or other defendants (*see e.g., People* v. *Earegood,* 12 Mich. App. 256, 162 N.W.2d 802, 809 (Ct. App. Mich. 1968), *rev'd on other grounds,* 383 Mich. 82, 173 N.W.2d 205 (1970); and *State* v. *Buckalew,* 561 P.2d 289, 294 (Sup. Ct. Alaska, 1977) (O'Connor, J., dissenting)).

It is difficult to perceive how plea negotiations are less coercive where the prosecutor, rather than trial judge,

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[20] For a discussion of the deference paid by the courts to prosecutorial sentence recommendation and its consequences in a system of non-participation, *see* Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 Colum. L. Rev. 1059, 1061-1076, 1107-1108 (1976). In essence, the sentencing function is turned over to the prosecutor.

An example of the kind of pressure which may be lawfully exerted by the prosecutor is found in *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), where the prosecutor threatened to reindict the defendant under the Habitual Criminal Act, carrying a mandatory sentence of life imprisonment, if he did not plead guilty to the existing indictment in return for a sentence recommendation of five years.

Indeed, it has been stated that the greatest source of pressure to plead guilty is the prosecutor, particularly where the evidence of defendant's guilt is weak (*see, e.g., Note, Restructuring the Plea Bargain,* 82 Yale L.J. 286, 292-293, 303, 305 (1972)).

calls the court's well-known sentencing policies to the defendant's attention and then "offers" him a shorter sentence by either a sentence recommendation, which is routinely accepted, or a charge reduction.[21]

Indeed,

> the question immediately arises whether it makes any sense to single out for condemnation only the case where the judge himself brings this policy to the defendant's attention. Because it is no surprise to the accused, but confirmation of what he almost certainly has been told, it is doubtful whether any additional pressure is being exerted on the defendant. . . . (Note, *Judicial Plea Bargaining,* 19 STAN. L. REV. 1082, 1085 (1967)).

A second argument is that judicial participation in plea negotiations should be prohibited because of the likelihood that a trial judge could not conduct a fair trial after negotiations had terminated. Petitioner adds that, consistent with due process, a judge could participate in the plea negotiations if another judge presides at the trial. Due process imposes no such restrictions (*see, e.g., United States* v. *Gallington,* 488 F.2d 637 (8th Cir. 1973), *cert. denied,* 416 U.S. 907 (1974), and, *United States* v. *Walker,* 473 F.2d 136 (D.C. Cir. 1972)).

Aside from judicial awareness that, "pleas of guilty are often offered for reasons other than actual guilt . . ." (*United States* v. *Walker,* 473 F.2d 136, 138 (D.C. Cir. 1972). *See Brown* v. *Peyton,* 435 F.2d 1352, 1356 (4th Cir. 1970), *cert. denied,* 406 U.S. 931 (1972); and Alschuler, *The*

[21] *See, Shupe* v. *Sigler,* 230 F. Supp. 601, 606 (D. Neb. 1964): "Whether the court or prosecutor makes the threats or promises seems immaterial."

Trial Judge's Role In Plea Bargaining, Part I, 76 COLUM. L. REV. 1059, 1109 (1976), trial judges are frequently exposed to information which is at least as prejudicial as a defendant's participation in plea negotiations or his offer to plead guilty. For example, a court may suppress evidence which conclusively establishes the movant's guilt or may have presided at the defendant's first trial which was reversed on appeal. Yet no one would seriously contend that, in either case, due process would prohibit the court from presiding at trial or that the defendant's plea of guilty was involuntary because he believed that the court could no longer be impartial (*see, e.g., Withrow* v. *Larkin,* 421 U.S. 35, 49, 56 (1975); *Ungar* v. *Sarafite,* 376 U.S. 575, 584-588 (1964)).

Petitioner's suggestion about a division of responsibility between a plea-bargaining judge and a trial judge provides little assurance that the trial judge will not later learn that the defendant participated in plea negotiations and that, for one reason or another, the negotiations were terminated. In addition, the administrative burdens and costs imposed on an already strained court system, particularly in the small and single-judge jurisdictions, would be substantial. The problem would of course be magnified where the defendant uses this "reassignment" or "substitute-judge" plan to "shop around" for a sympathetic judge (*see,* Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1111-1114 (1976)).

A third argument frequently cited in support of prohibiting judicial participation in the plea bargaining process is that it ". . . makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered . . ." (ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, § 3.3(a), *Commentary,* at p. 73 (App. Draft, 1968)). This criticism, how-

ever is applicable to the plea bargaining system as a whole since there is no reason to conclude that a judge who refrains from participating in plea bargaining will conduct the kind of "penetrating and comprehensive examination" (*United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244, 255 (S.D.N.Y. 1966) (quoting *Von Moltke* v. *Gillies,* 332 U.S. 708, 724 (1948) (plurality opinion)), envisioned by the prohibition advocates, at least so long as he is confronted with substantial case-load pressures (Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1114 (1976).[22] As noted by one commentator,

> . . . the effectiveness of [the] examination, as currently conducted, has been exaggerated (footnote omitted). Neither prosecution nor defense now disclose candidly the ful details of their plea.
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> * * *
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> At this late stage in the bargaining process, the interests of the prosecutor and defendant are no longer adverse. Instead they have a joint commitment to the success of the plea bargain they have shaped. The parties therefore seek to present to the judge a facade of scrupulous regularity. (Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 306-307, 307 n.68 (1972). *See,* Note, *Judicial Plea Bargaining,* 19 STAN. L. REV. 1082, 1088 (1967); Comment, *New Federal Rule of Criminal Procedure* 11(e): *Dangers In Restricting The Judicial Role In Sentencing Agreements,* 14 THE AM. CRIM. L. REV. 305, 314, 314 nn. 45-46 (1976)).[23]

[22] In *People* v. *Ganci,* 27 N.Y.2d 418, 267 N.E. 2d 263, 318 N.Y.S. 2d 484 (1971), *cert. denied,* 402 U.S. 924 (1971), the Court of Appeals noted the substantial congestion of the criminal trial calendar in holding that the sixteen month delay between the defendant's arraignment on the indictment and trial did not deprive him of his constitutional and statutory right to a prompt trial.

Obviously, the "substitute judge" proposed by petitioner would be in no better position to assess the voluntariness of the plea than the plea-bargaining trial judge or judge whose role is confined to ratification or the rejection of the proffered plea (*see,* Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1115 (1976)).

The point is that the participation of the judge in plea discussions, whether he is the trial judge or plea bargaining judge, is consistent with due process when conducted in open court in the presence of both the defense and prosecution, and when the proceedings are fully transcribed for later appellate review (*see, generally, Blackledge* v. *Allison,* 431 U.S. 63, 76-77 (1977)). Any improprieties would be readily discernible in a record protected and amplied by defense counsel (*see, e.g., United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959); *People* v. *Williams,* 46 App. Div. 2nd 783, 360 N.Y.S. 2d 453 (2d Dept. 1974); and *People* v. *Dennis,* 28 Ill. App. 3rd 74, 328 N.E.2d 135 (1975)). Moreover, negotiations can take place in an atmosphere of candor and fairness presided over by the one person who is responsible for creating that atmosphere. The agreement reached will be more reflective of the needs of the defendant and the State than an agreement reached between the parties most interested in the outcome, especially since the judge will have the information he needs to make an informed decision (*see,* Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509, 515, 517 (1971). *Compare Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978)). "It is the errant judge, not judicial participation in general that is coercive." (Note,

[23] For an example of the deceit resorted to by a plea-bargaining defendant, *see, United States* v. *Stassi,* 583 F.2d 122 (3rd Cir. 1978).

New Federal Rule of Criminal Procedure 11(e): *Dangers In Restricting The Judicial Role In Sentencing Agreements,* 14 THE AM. CRIM. L. REV. 305, 311 n.32 (1976), citing Lambros, *supra,* 53 F.R.D. at 516-518. See, *State* v. *Buckalew,* 561 P.2d 289, 293-294 (Sup. Ct. Alaska, 1977) (O'Connor, J., dissenting); and, *Commonwealth* v. *Evans,* 434 Pa. 52, 252 A.2d 689, 692 (1969) (Bell. Ch. J., dissenting).

In short, judges ". . . are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." (*United States* v. *Morgan,* 313 U.S. 409, 421 (1941)). Consistent with the notion that ". . . it is the defendant's perception of the judge that will determine whether the defendant will feel coerced to enter a plea . . ." (*United States* v. *Werker,* 535 F.2d 198, 202 (2nd Cir. 1976), *cert. denied,* 429 U.S. 926 (1976)), a defendant should be required to demonstrate that he *reasonably* believed that he could not get a fair trial before setting aside his counseled plea (*Cf. United States* v. *Nazzaro,* 472 F.2d 302, 303 (2nd Cir. 1973)). That burden, we submit, is not satisfied merely by claiming that the trial judge participated in the plea negotiations (*see, Ungar* v. *Sarafite,* 376 U.S. 575 (1964)). Moreover, there is no reason to believe that the coercive atmosphere allegedly created by the participation of the trial court cannot be dissipated by the presence of counsel (*see, generally, Miranda* v. *Arizona,* 384 U.S. 436, 461, 466 (1966); and *Brady* v. *United States,* 397 U.S. 742, 753-754 (1970)).

To support his contention that due process forbids the participation of the trial judge in plea negotiations, petitioner relies on *United States* v. *Jackson,* 390 U.S. 570 (1968). In *Jackson,* this court held unconstitutional the death penalty provision of the federal anti-kidnapping law

which permitted the imposition of the death sentence only upon a jury's recommendation. The problem in *Jackson* was to determine "whether the Constitution permits the establishment of a such a death penalty, applicable only to those who assert the right to contest their guilt before a jury." (*Id.* at 581). For a due process violation to be found under *Jackson,* three factors must be present: A penalty which attaches to the assertion of a right; the chilling effect on the assertion of that right as an incident of the penalty; and, an alternative means of achieving a legitimate goal which renders the penalty needless. (*see Brady* v. *United States,* 397 U.S. 742, 746 (1970)). It is clear, however, that *Jackson* did not hold that every burden on the exercise of a constitutional right is invalid (*Corbitt* v. *New Jersey,* —U.S.— (Decided December 11, 1978; No. 77-5963), slip opinion at 5-6).[24]

No one can contend that plea bargaining is prohibited by the Constitution or that it is not an effective method of achieving legitimate goals (*see, Blackledge* v. *Allison,* 431 U.S. 63, 71 (1977)). And, as outlined above, the participation of the judge in plea negotiations, whether or not that judge will later preside at trial, is not inherently coercive. The court's participation serves the salutary purpose of insulating the accused from a possibly overbearing prosecutor whose adversarial role in the plea negotiations may discourage the formulation of an agreement which serves the interests of both the defendant and the State. Moreover, a record of the proceedings and defense counsel protect the defendant from an overbearing judge.

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[24] Petitioner, we think, has misconstrued *Jackson.* The "evil" which this Court found in the federal statute was ". . . not that it necessarily *coerces* guilty pleas and jury waivers but that it needlessly *encourages* them." (390 U.S. at 583). Thus, the language which petitioner liberally extracts from Jackson is inappropriate to establish that a practice is inherently coercive.

In the case at bar, petitioner has failed to identify the penalty which is imposed upon a defendant who asserts his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a trial when the same judge participates in the plea negotiations and presides at trial. A "penalty" is imposed within the meaning of due process when a defendant is sentenced more harshly after his first conviction is reversed and the second sentence is not based on any information developed since the first trial (*North Carolina* v. *Pearce,* 395 U.S. 711 (1969)). In *Pearce,* data was collected showing that increased sentences on reconviction were "far from rare . . ." (395 U.S. 711, 725 n.20), thereby leading this Court to believe that the hazard of being penalized inhered in the resentencing process (*compare, e.g., Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973); and, *Colten* v. *Kentucky,* 407 U.S. 104 (1972)). Similarly, due process is violated when a defendant is subjected to punishment which is applicable only to those who assert their right to a jury trial (*See, United States* v. *Jackson,* 390 U.S. 570 (1968); and, *Corbitt* v. *New Jersey,* — U.S. — (Decided December 11, 1978; No. 77-5903)). And lastly, due process was violated in *Blackledge* v. *Perry,* 417 U.S. 21 (1974), because the prosecutor reindicted a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy. Each of these cases involved ". . . the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . ." (*Bordenkircher* v. *Hayes,* 434 U.S. 357, 362 (1978)).

Plea bargaining presents a different case. The Constitution does not forbid the State from offering substantial benefits to defendants to encourage them to plead guilty (*Corbitt* v. *New Jersey,* — U.S. — (Decided, December 11, 1978; No. 77-5903) slip opinion at p. 6). By the same token, there are legitimate reasons for imposing a more substantial sentence when a defendant is convicted after a trial, *e.g.,* trial observation of the defendant as well as exposure to the evidence against him (*see, North Carolina* v. *Pearce,* 395 U.S. 711, 723 (1969)). Thus, in the absence of vindictiveness, a higher sentence may constitutionally be imposed, despite whatever incidental deterrent effect the higher sentence might have on the assertion of Fifth and Sixth Amendment rights (*see Chaffin* v. *Stynchcombe,* 412 U.S. 17, 29, 32 n.20 (1973); and *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978)).[25]

Similarly, the hazard that the participating judge will deprive the defendant of a fair trial does not inhere in this plea bargaining system to any greater extent than where a judge, presiding at a pre-trial hearing, suppresses evidence which conclusively establishes guilt and then presides at trial.

Due process *is* violated ". . . where the . . . judge 'deliberately employ[s] (his) . . . sentencing power[ ] to induce a defendant to tender a plea of guilty,' . . . and where [he does] so with the 'objective [of] penaliz[ing] a person's reliance on his legal right . . .' " (*Corbitt* v. *New Jersey,* — U.S. — (Decided, December 11, 1978; No. 77-5903), dissenting opinion at p. 5. *See, Parker* v. *North Carolina,* 397 U.S. 790, 802 (1970) (Opinion of BRENNAN, J., in which DOUGLAS, J., and MARSHALL, J., joined). *Cf. Webb* v. *Texas,* 409 U.S. 95 (1972). Certain statements made by

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[25] A trial judge who has participated in plea negotiations simply does not have the same motivation to penalize a defendant for asserting his constitutional rights as does a judge who has been reversed on appeal (*see, generally Chaffin* v. *Stynchcombe,* 412 U.S. 17, 27 (1973); and *North Carolina* v. *Pearce,* 395 U.S. 711 (1969)). There is nothing in the record or petitioner's brief to show that the hazard of being penalized for asserting Fifth and Sixth Amendment rights inheres in a system of plea bargaining which permits judicial participation (*compare, North Carolina* v. *Pearce,* 395 U.S. 711, 725 n.20 (1969)).

the court are by their nature inherently coercive, *e.g.*, "if you plead guilty, you will receive the minimum sentence; if you go to trial you will be entitled to no consideration from the court" (*see, e.g., United States* v. *Herron,* 551 F.2d 1073, 1077 (6th Cir. 1977); *Tyler* v. *Swenson,* 427 F.2d 412 (8th Cir. 1970); *Euziere* v. *United States,* 249 F.2d 293 (10th Cir. 1957); and, *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963). Similarly, where the court sentences a defendant to a harsher term *because* the defendant refused to plead guilty, he has been penalized (*see, e.g., Wiley* v. *United States,* 267 F.2d 453 (7th Cir. 1959)).

Due process may also be violated when the defendant pleads guilty because he *reasonably* believes that when the same judge participates in the plea negotiations and presides at trial, he will not get a fair trial. A reasonable belief is not based on the court's participation alone; it may be based upon the court's conduct, including his statements, during or after the negotiations (*see, Schaffner* v. *Greco,* — F. Supp. — (S.D.N.Y. 1978) (77 Civ. 281; Decided 10/20/78), slip opinion at 6-10).

Due process is violated in these cases because the defendant is not free, in a constitutional sense, to accept or reject the court's proposal; his rights not to plead guilty and demand a trial become illusory (*see, Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978)). Due process is also violated when defendant has been ". . . punish[ed] . . . because he has done what the law plainly allows him to do . . ." (*Id.,* at 363).

The mere participation of the trial judge in plea negotiations is not inherently coercive. Thus, in the absence of "patently unconstitutional conduct" petitioner's counseled plea of guilty, like every other plea, must be measured against the "totality of the circumstances", in which all of the relevant circumstances surrounding the plea are considered (*Brady* v. *United States,* 397 U.S. 742, 749 (1970).

In North Carolina v. *Alford,* 400 U.S. 25, 31 (1970), this Court said:

> *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. (Citations omitted). That he would not have pleaded guilty except for the opportunity to limit the possible death penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

The *participation* of the trial judge in plea negotiations is only one factor to be considered in determining whether the plea was voluntary (*Toler* v. *Wyrick,* 563 F.2d 372 (8th Cir. 1977), *cert. denied,* 98 Ct. 1455; *United States ex rel. Robinson* v. *Housewright,* 525 F.2d 988 (7th Cir. 1975); *Brown* v. *Peyton,* 435 F.2d 1352 (4th Cir. 1970), *cert. denied,* 406 U.S. 931 (1972); *United States ex rel. McGrath* v. *LaVallee,* 348 F.2d 373 (2nd Cir. 1965), *cert. denied,* 383 U.S. 952 (1966); *Toler* v. *State,* 542 S.W.2d 80 (Ct. App. Mo. 1976); *Anderson* v. *State,* 263 Ind. 583, 335 N.E.2d 225 (1975); *People* v. *Montgomery,* 27 N.Y.2d 601, 261 N.E.2d 409, 313 N.Y.S.2d 411 (1970); and, *People* v. *Darrah,* 33 Ill. 2d 175, 210 N.E.2d 478 (1965), *cert. denied,* 383 U.S. 919 (1966), *reh. denied,* 383 U.S. 963 (1966).[26]

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[26] Several state and federal courts which have criticized judicial participation in the plea bargaining process have relied to a significant degree on the reasoning found in the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a). (*See, e.g., Brown* v. *Beto,* 377 F.2d 950 (5th Cir. 1967); *Scott* v. *United States,* 419 F.2d 264 (D.C. Cir. 1969); *State* v. *Buckalew,* 561 P.2d 289 (Sup. Ct. Alaska 1977); *State* v. *Wolfe,* 46 Wis. 2d 478, 175 N.W.2d 216 (1970); and *Commonwealth* v. *Evans,* 434 Pa. 52, 252A.2d 689 (1969). In light of the proposed changes in the Standards relating to the proper judicial role in plea bargaining, the continued vitality of these decisions is open to some doubt (*see,* Approved Draft of the Standing Committee on American Bar Association Standards for Criminal Justice, § 14-3.3 (c), (e) *See, ante,* p. 19 n. 17 for discussion of the changes.

In conclusion, the participation of the trial judge in plea negotiations is compatible with due process when both the prosecution and the defense attend the negotiations, and when the proceedings are transcribed for appellate review. Under this system, the rights of the State and the defendant should be fully protected. Since the "bifurcated system" advocated by petitioner is not constitutionally mandated, New York should be permitted to develop its own rules governing plea procedure consistent with due process (*see, Haley* v. *Ohio*, 332 U.S. 596, 604 (1948) (FRANKFURTER, J., concurring)).

In the absence of "patently unconstitutional" conduct, petitioner's plea should be measured by the traditional test of voluntariness in which the participation of the trial judge is but one of several factors to be considered.

B. The Court's Conduct Does Not Require the Vacatur of Petitioner's Plea.

We agree with petitioner that,

> . . . it has long been held that *certain promises or threats of harsh treatment by the trial court* or prosecutor unfairly burden or intrude upon the defendant's decision-making process. Even though the defendant is not necessarily rendered incapable of rational choice, his guilty plea may be invalid (footnote omitted). *Parker* v. *North Carolina*, 397 U.S. 790, 802 (Opinion of BRENNAN, J., in which DOUGLAS, J., and MARSHALL, J., joined) (emphasis added)).

However, ". . . there is no *per se* rule against encouraging guilty pleas." (*Corbitt* v. *New Jersey*, — U.S. — (Decided December 11, 1978; No. 77-5903) slip opinion at p. 6). A distinction, therefore, has been drawn between conduct which is "patently unconstitutional" and conduct which merely encourages guilty pleas. We submit that Mr. Justice Held's conduct falls within the latter category.

After petitioner was positively and convincingly identified at the pre-trial (*Wade*) identification hearing,[27] petitioner was informed through counsel that if he pleaded guilty to robbery in the first degree, the court would sentence him to a term of imprisonment of six to twelve years. At the same time, Mr. Justice Held informed defense counsel that, if petitioner were convicted after trial, the court would impose a sentence of twelve and one-half years to twenty-five years, "(s)ubject of course of me (*sic*) reading the probation report (since) (i)t is a practice in my court when there is an armed robbery, to give . . . a maximum sentence, unless there are mitigating circumstances." (App. 28). Defense counsel and petitioner discussed the offer, which was ultimately accepted (App. 28).[28]

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[27] *United States* v. *Wade*, 388 U.S. 218 (1967); N.Y. Crim. Pro. Law § 710.20(5).

[28] Petitioner and respondent disagree concerning the chronology of events preceding the plea. According to petitioner's reading of the record, the court's statement concerning the imposition of the maximum sentence was conveyed to him *after* he initially rejected the court's six to twelve year offer. He also suggests that the qualifying language, *viz.*: "subject . . . of me reading the probation report . . .", was an afterthought mentioned for the first time at the sentencing. (*Petitioner's Brief* at pp. 25, 26-27).

We submit that the more logical interpretation of the record is that the court's statement concerning the sentence alternatives was made at the same time. In this regard, the interpretation of the record is crucial since if petitioner's interpretation of the sequence of events is the correct one, he may well be entitled to the relief he seeks.

With regard to his suggestion that the qualifying language was mentioned at the sentencing for the first time as an afterthought, the following should be noted. First, when Mr. Justice Held corrected defense counsel's recollection of the events surrounding the plea by adding the qualifying language, counsel made no objections. Thus, his ratification of the court's recollection is clear from the record. Second, there is no record of defense counsel's conversation with petitioner after the bench conference at which the plea was discussed. If petitioner was not informed of this qualifying language, his grievance is with his lawyer, not the judge. However, no claims concerning counsel's adequacy have been made.

A third interpretation, which combines both petitioner's and respondent's, is that the court advised counsel that he would accept a plea to robbery in the first degree and sentence petitioner to a six to twelve year term of imprisonment. Counsel then relayed that information to petitioner, who rejected the proposal. Counsel returned to the bench at which time he was advised of the court's sentencing policies. These facts do not establish patently unconstitutional conduct either.

In our view, a plea should be set aside when ". . . it is clear that the statements [by the judge] were calculated to influence the defendant[] to the point of coercion into entering the plea[] of guilty." (*Euziere* v. *United States,* 249 F.2d 293, 295 (10th Cir. 1957)). Under this standard, where a judge tells the defendant that, if he is convicted after trial, he will be entitled to no consideration, and then threatens him with the imposition of a maximum (possibly illegal) sentence, the defendant's plea may be invalid. The situation is quite different, where, *as here,* the judge, without commenting on the strength of the case or offering advice, informs the defendant through counsel that, in the absence of mitigating circumstances, his practice is to impose the maximum sentence permitted by law and then says that he will depart from that practice and sentence the defendant to a lesser, specific sentence if he pleads guilty.

In the first example, the court's statement may only be viewed as a threat to penalize the assertion of Constitutional rights. To require a defendant to choose between the imposition of the maximum penalty (possibly life imprisonment) if he is convicted after trial and the prospect of a substantially reduced term if he pleads guilty, ". . . amounts to a coercion as a matter of law." (*United States* v. *Tateo,* 214 F. Supp. 560, 567 (S.D.N.Y. 1966) (Weinfeld, D.J.)). In the second case, the defendant is offered lenient treatment consistent with the policies underlying plea bargaining. *If* convicted after trial, the defendant will be accorded every consideration consistent with the lawful exercise of the court's sentencing prerogatives. The court's statement therefore merely "encourages" the defendant to plead guilty. (*See, ante,* at pp. 29-30).

To support his contention that Mr. Justice Held's statement concerning the sentence alternatives could only be construed as a threat to penalize the assertion of constitutional rights, petitioner relies on the "disparity" between the sentence alternatives and a remark made by the court at the conclusion of the sentencing. We think that this reliance is misplaced.

The record discloses that when petitioner first appeared before Mr. Justice Held, the original plea offer, *viz:* a conditional sentence promise of three and one-half years to seven years and a plea to robbery in the second degree, was resurrected (App. 27). Petitioner rejected the proposal and insisted that he was innocent (App. 27).

The next day, the *Wade* hearing was conducted at which the People's only witness described the robbery and identified petitioner as the perpetrator. The court, now acquainted with the facts and circumstances of the crime, legitimately offered a plea to robbery in the first degree and conditionally promised a sentence of six to twelve years. (*See, North Carolina* v. *Pearce,* 395 U.S. 711, 723 (1969)).[29] Without making any commitments, the court also disclosed its sentencing practices in armed robbery cases, which could be reduced if mitigating factors appeared in the probation report (App. 28). Thus, petitioner was advised that, *at most,* the sentence upon conviction after trial would be twice that imposed upon a plea of guilty. Petitioner was therefore told that the sentence differential could be less (*see, Murray* v. *United States,* 419 F.2d 1076 (10th Cir. 1969)).

In *Corbitt* v. *New Jersey,* — U.S. — (Decided December 11, 1978; No. 77-5903), slip opinion at 11, this Court,

> . . . unequivocally recognize[d] the constitutional propriety of extending leniency in exchange for a plea of guilty and not extending leniency to those who

[29] The prosecutor had apparently revised the plea offer after the *Wade* hearing was completed [App. 28].

> have not demonstrated those attributes on which leniency is based.

We are unable to perceive the constitutional infirmity in the flexible sentencing differential proposed by Mr. Justice Held in the case at bar (*compare, e.g., People* v. *Clark,* 183 Colo. 201, 515 P.2d 1242 (1973); *Letters* v. *Commonwealth,* 346 Mass. 403, 193 N.E.2d 578 (1963); and, *State* v. *Benfield,* 264 N.C. 75, 140 S.E.2d 706 (1965)).

With regard to the court's remark at the conclusion of the sentence proceeding, petitioner has isolated two sentences and placed an interpretation on them which finds no support in the record. After reviewing an unsavory probation report, which referred to an "interesting" view of the criminal justice system and petitioner's relationship to it, Mr. Justice Held mused:

> The defendant shows no remorse whatsoever. I almost wish that I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive.
>
> Unfortunately, it appears quite obvious that at least at this juncture unfortunately that he is not going to be reformed. He is only going to become punished (App. 33).

It is obvious from the entire statement that Mr. Justice Held was expressing regret about the sentence he promised to petitioner in light of the information provided to him

after the conditional promise was made (see, e.g., *United States ex rel. McGrath* v. *LaVallee,* 348 F.2d 373, 375 (2nd Cir. 1966), *cert. denied,* 383 U.S. 952 (1966); and, Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 291 (1972)). Mr. Justice Held was also expressing the concern expressed by many judges today that this defendant, because he showed "no remorse whatsoever", was not going to profit from his experience in prison and possibly become a useful member of society when released. To that extent, six to twelve years "is enough time for this man to receive (since) (h)e is only going to become punished." (App. 33) (emphasis added).

To adopt petitioner's casuistry in the case at bar would cripple any viable system which encourages guilty pleas by offering substantial benefits. A sentence differential is critical to the plea bargaining process; without it a defendant would have little reason to plead guilty. So long as the defendant is free in a constitutional sense to accept or reject the court's offer, due process is not violated. (*See, Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978)).

A fair reading of the record supports the conclusion that the court's sentencing statement was merely an encouragement to plead guilty. A substantial benefit was offered to petitioner which petitioner was free to accept or reject. There was nothing in the statement which would support the belief that if petitioner rejected the offer, the court would punish him for exercising his constitutional rights. The terms of the offer were not so disparate that to require a choice amounted to coercion as a matter of law. Accordingly, Mr. Justice Held's conduct in the case at bar does not require the vacatur of petitioner's plea.

C. Petitioner's Plea of Guilty Was Voluntary.

The voluntariness of petitioner's plea can only be determined by considering all of the relevant circumstances surrounding it (*Brady* v. *United States,* 397 U.S. 742, 749 (1970)), of which the participation of the court is but one (*see,* cases collected at ante, p. 31). The circumstances are to be judged by objective standards (*Toler* v. *Wyrick,* 563 F.2d 372, 373 (8th Cir. 1977), *cert. denied,* 98 S. Ct. 1455; *United States* v. *Cruso,* 536 F.2d 21, 24 (3rd Cir. 1976); *United States ex rel. Robinson* v. *Housewright,* 525 F.2d 988, 991-992 (7th Cir. 1975); *Mosher* v. *LaVallee,* 491 F.2d 1346, 1348 (2nd Cir. 1973), *cert. denied,* 416 U.S. 906 (1974); and *United States ex rel. Curtis* v. *Zelker,* 466 F.2d 1092, 1098 (2nd Cir. 1972), *cert. denied,* 410 U.S. 945 (1973). The question to be resolved is not so much whether the judge participated in the plea discussions, but what was said and its probable effect (*United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308, 315 (2nd Cir. 1963) (Friendly, C.J., concurring and dissenting); and, *People* v. *Darrah,* 33 Ill. 2d 175, 210 N.E.2d 478 (1965), *cert. denied,* 383 U.S. 919 (1966), *reh. denied,* 383 U.S. 963 (1966). *See, Harrison* v. *United States,* 392 U.S. 219, 223 (1968)). We submit that, "[a]lthough mindful that courts must indulge in every reasonable presumption against the loss of constitutional rights . . ." (*Illinois* v. *Allen,* 397 U.S. 337, 343 (1970), the record amply supports the conclusion that petitioner's plea was not coerced by Mr. Justice Held's statement concerning the sentence.

At the taking of the plea, petitioner, who was represented by counsel, signaled his understanding of the legal consequences of his decision to plead guilty. Petitioner unhesitatingly acknowledged that his plea was voluntary and it was offered because he was guilty. A factual basis for the plea was developed by the court, and petitioner

stated that he was relying on no promises other than Mr. Justice Held's promise concerning the sentence.

In *Blackledge* v. *Allison,* 431 U.S. 63, 74 (1977), this Court observed that ". . . the representations of the defendant . . . at the (taking of the plea) constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." Petitioner's unhesitating admissions are therefore strong evidence of the plea's voluntariness, especially in the absence of any allegations that he was directed to affirmatively answer Mr. Justice Held's questions (see, *Blackledge* v. *Allison, supra,* 431 U.S. at 77-78; and *United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308, 321 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting)). Moreover, "[t]he person closest to (petitioner) during the proceedings, his trial counsel . . .". (*Petitioner's Brief* at p. 30), assumed that "[w]hen (his client) pleaded guilty . . . he *was* guilty." (App. 28). (Emphasis added).

It should also be noted that in September, 1975, Petitioner pleaded guilty to the same consolidated indictment and three months later withdrew that plea. Thus, within one year, petitioner twice admitted his guilt, affirmatively providing a factual basis for the plea and satisfactorily answering the inquiries of two Justices of the Supreme Court. Within that same time period, he also insisted that he was "railroaded" (App. 103) and "coerced" (App. 12-17; 21-33). The absence of any of the indicia of innocence or coercion at the taking of the plea, we submit, militates against his after-the-fact assertions to the contrary (*see, United States* v. *Brady,* 397 U.S. 742, 758, (1970)).

Second, petitioner's plea came after he was identified at the *Wade* hearing as the perpetrator of the robbery and after the court advised defense counsel at a bench confer-

ence of the range of sentencing alternatives resulting from a conviction after trial and a plea of guilty.[30] The testimony at the *Wade* hearing was particularly significant because it not only marked the first time that petitioner was corporeally identified, but it also marked his first exposure to the witness' devastating testimony.[31] Thus, contrary, to petitioner's assertions, *two* events intervened between petitioner's demand of a trial and his second plea of guilty two days later (*compare, United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308, 319 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting)).

In *Brady* v. *United States,* 397 U.S. 742, 756 (1970), this Court recognized that,

> (o)ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and the apparent likelihood of securing leniency should a guilty plea be offered and accepted.

Petitioner may well have preferred to plead guilty recognizing that his chances for acquittal were slight, and thereby avail himself of a more lenient sentence. Such considerations do not militate against a finding that the plea was voluntary (*Id.,* at 750-751).

It is also significant that the intervening events came before trial when petitioner was still able to consider the alternatives with relative objectivity (*compare, e.g., Schaffner* v. *Greco,* — F. Supp. — (S.D.N.Y. 1978) (77 Civ. 281, Decided 10/20/78) (Lasker, D.J.) and, *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963)). The court neither commented about the strength of the prosecution's case nor advised petitioner to take a plea (*compare, e.g., United States* v. *Anderson,* 468 F.2d 440 (5th Cir. 1972); *United States* v. *Schmidt,* 376 F.2d 751 (4th Cir. 1967), *cert. denied,* 389 U.S. 884 (1967); *United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308 (2nd Cir. 1963); *Beaver* v. *State,* 247 S.E.2d 448 (Sup. Ct. S. Car. 1978); *Byrd* v. *United States,* 377A.2d 400 (D.C. App. 1977); and, *State* v. *Benfield,* 264 N.C. 75, 140 S.E.2d 706 (1965)). And, petitioner points to no conduct in the record to support his belief that the court would not treat him fairly at trial (*compare, e.g., Euziere* v. *United States,* 249 F.2d 293 (10th Cir. 1957); *Schaffner* v. *Greco,* — F. Supp. — (S.D.N.Y.) (77 Civ. 281; Decided 10/28/78) (Lasker, D.J.), slip opinion at 8-10; *Letters* v. *Commonwealth,* 346 Mass. 403, 193 N.E.2d 578, 580 (1963); and, *Rogers* v. *State,* 243 Miss. 219, 136 So.2d 331 (1962)).[32]

A third factor to be considered is the ". . . background, experience, and conduct of the accused." (*Johnson* v. *Zerbst,* 304 U.S. 458, 464, (1938)). At twenty-four years of age, petitioner, who was represented by counsel and had pleaded guilty once to the same consolidated indictment, already had an extensive criminal record, including adjudi-

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[30] We again note our differences with petitioner concerning the chronology of events preceding the plea. (See *ante,* p. 33, n.28.)

[31] Mrs. Walker testified that she had seen petitioner's face throughout the incident, which lasted five to ten minutes. The witness also testified that she had seen petitioner in the neighborhood on two occasions a few weeks before the robbery and insisted that "[t]wenty years from now I will still remember his face." [App. 64].

[32] Petitioner claimed that Mr. Justice Held was "prejudiced" because of his ruling on the motion to suppress identification testimony. The record reveals that the court never decided the motion. Both petitioner at the taking of the plea [App. 7], and defense counsel at the sentencing [App. 32], conceded as much.

Petitioner also complained about the court's prejudicial remarks made in the presence of the jury. A transcript of the jury selection was not submitted to the Appellate Division nor has it been made a part of this record. Respondent should not be required to respond to such assertions (*see, Machibroda* v. *United States,* 368 U.S. 487 [1962]).

cations as a juvenile delinquent and as a Youthful Offender, and a robbery conviction as an adult offender. In fact, he was on parole when he committed the crimes which were the subject matter of his plea. Petitioner certainly was not inexperienced in the intricacies of the criminal law and procedure when he pleaded guilty for the second time (*see, Uveges* v. *Commonwealth of Pennsylvania,* 335 U.S. 437, 442 (1948)).

As a predicate felon, petitioner was aware that if convicted after a trial he would receive a maximum term of imprisonment of nine and one-half years to twenty-five years, and a minimum term of imprisonment of one-half the maximum term (*see,* N.Y. Penal Law § 70.06(3)(a), (4) (McKinney 1975)). Moreover, petitioner was accused in two separate indictments of the crime of robbery in the first degree. If convicted under both indictments a maximum sentence of twelve and one-half years to thirty years could be imposed (*see,* N.Y. Penal Law § 70.30(1) (b), (c) (McKinney 1975)).

Under these circumstances, Mr. Justice Held's statement concerning the range of sentencing alternatives, as well as their conditional nature, could hardly have come as a surprise to petitioner. Considering his criminal background and the seriousness of the charges petitioner was merely informed of the reality of his situation—a reality which could not have been unknown to him.

The information contained in petitioner's psychiatric reports is also revealing. Those reports describe him as a manipulator (App. 80) and a malingerer (App. 92). One psychiatrist commented that he "... appears to be a rather 'street wise' individual (who in all likelihood) with all his years in prison ... has acquired the correct answers to give the psychiatrists." (App. 80, 81). The reports also reveal

a persistent pattern of anti-social behavior suggesting a contempt for the law and authority (App. 80-81; 86 and 87; 102 and 104). The portrait painted is not one of an easily cowed individual. Indeed, his abusive and contemptuous behavior at the sentencing, which resulted in a thirty day contempt citation, only serves to corroborate the conclusions in aforementioned reports.

Fourth, the pattern of petitioner's conduct during the twenty-one months between his arrest and sentencing suggests an effort on his part to thwart the prosecution of his two indictments. In addition to the several psychiatric examinations, petitioner was assigned four different attorneys, pleaded guilty twice and was permitted to withdraw that plea after he was again examined by psychiatrists to determine his fitness to proceed and by the Probation Department in aid of sentencing.[33]

Most revealing of this pattern is petitioner's statement to the Probation Department that one reason for his decision to withdraw his second plea was his belief that his sentence was excessive " . . . especially so because his co-defendant in indictment 431 of 1975 was sentenced to two to four years." (App. 32). Petitioner also stated that "... three and a half to seven years (the original sentence promised *twice* rejected) would be acceptable to him and he is considering to withdraw his plea if Your Honor follows through with the promise of six to twelve." (App. 32).

The inescapable conclusion to be drawn from the "totality of the circumstances" is that petitioner, who was at all times represented by able counsel and was himself experi-

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[33] Parenthetically, we note that petitioner was found unfit to proceed because "... he *verbalized* suicidal ideas ..." [App. 92] and because of his "... failure to participate in the psychiatric evaluation ..." [App. 85]. However, after finding him fit to proceed at a later time, the examining psychiatrist observed that "... the manner in which he spoke, as well as words, suggest artifice or affection of illness." [App. 94].

enced in the criminal law and procedure, was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and his desire to limit his penal liability. When viewed in this context, the court's comments pertaining to the sentencing alternatives, *conveyed to petitioner by counsel,* could not have had the effect he belatedly ascribed to them. What emerges from this record is a shrewd and experienced plea bargainer rather than an intimated and coerced victim of an overbearing judge. Petitioner should not be permitted to withdraw his counseled plea of guilty simply because he is dissatisfied with his sentence (*see, Mathis* v. *State of North Carolina,* 266 F. Supp. 841, 845 (D.N.C. 1967)). Accordingly, the judgment of conviction should be affirmed.

CONCLUSION

The Court's participation in the plea bargaining process is not prohibited by the Constitution. Petitioner's counseled plea was voluntarily entered. The order of the Appellate Division should in all respects be affirmed.

Dated: Brooklyn, New York
December, 1978

Respectfully submitted,

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[34] The writer is indebted to Assistant District Attorney Laurie Stein Hershey who prepared the brief submitted to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I.

BECAUSE OF THE UNIQUE CONSTITUTIONAL FUNCTION OF A TRIAL JUDGE, THE LANGUAGE OF *CORBITT V. NEW JERSEY* (___ U.S. ___ , 99 S. CT. 492 [1978]), RELIED ON BY THE RESPONDENT, HAS NO BEARING ON THE QUESTIONS AT BAR.

Arguing that "the direct participation of *any* judge in plea negotiations. . . does not, standing alone, violate due

process," (Resp. Brief at 20), the respondent broadly asserts:

> This Court . . . at least tacitly approved some degree of judicial participation in *Brady v. United States*, . . ., and has expressly approved the offer of substantial benefits to *encourage* pleas. (*Corbitt v. New Jersey*, . . .) (Resp. Brief at 20.)

The juxtaposition of this language, however, gives rise to a mistaken notion of the holdings of the two cited cases.

First, although *Brady*[1] does make passing reference to "any commitments made. . . by the court," it does not suggest at what stage such commitments may properly be made. Because the petitioner maintains only that a trial judge may not constitutionally participate actively in the give-and-take of the negotiations for a guilty plea, the *Brady* language offers little assistance in the resolution of the narrow questions at bar.

Second, as a matter of basic constitutional law, the holding of *Corbitt*[2] can have no legitimate application to a trial judge. The Court wrote in *Corbitt* that

> . . . there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea.
> (____ U.S. at ____ , 99 S. Ct. at 497)

Hence, the majority opinion suggested quite clearly that, at least within a very limited framework, benefits in return for a plea may be offered by the State through a statutory scheme enacted by its legislature. *See, e.g.*, ____ U.S. at ____ , 99 S. Ct. at 500 n. 15. Similarly, in an earlier case, the Court found no constitutional violation when the State, this time through

[1] 397 U.S. 742, 755 (1970).

[2] ____ U.S. ____ , 99 S. Ct. 492 (1978).

the prosecutor, encouraged a defendant to plead guilty by presenting him with the unpleasant alternatives of foregoing trial or facing additional charges carrying mandatory life imprisonment. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

The essence of the respondent's position here is that these principles ought to be extended to permit the State in the same way to employ its trial judges to encourage defendants to tender guilty pleas. This argument must fail, however, because it takes no account of the very special role a trial judge plays in our system of criminal justice.

In a criminal case, a trial judge is not to be counted among the representatives of the State. Quite to the contrary, his function is to stand independently between the State and the accused; his responsibility is to insure the accused a fair hearing and to afford him all of the constitutional safeguards to which he is entitled. *See, e.g., United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (Weinfeld, D.J.); *cf. Rogers v. State*, 243 Miss. 219, 136 So. 2d 221, 335 (Sup. Ct. Miss. 1962).

Unlike a prosecutor, a trial judge may not assume an adversarial role and attempt to encourage a defendant to plead guilty by independently offering him substantial benefits in return for the plea. The respondent's suggestion to the contrary simply misapprehends the fundamental constitutional function of a trial judge and finds no support in either *Brady* or *Corbitt*.

II.

THE RESPONDENT'S IMPRECISE ANALYSIS OF *UNITED STATES V. JACKSON* (390 U.S. 570 [1968]) HAS LED HIM TO MISAPPLY ITS PRINCIPLES TO THE QUESTION AT BAR.

The petition has argued that this Court's analysis in *United States v. Jackson*[3] supports the proposition that due process requires trial judges to refrain from actively participating in pre-plea negotiations. The respondent maintains otherwise, but in doing so he has misconstrued both the penalty requirement of *Jackson* and the test of necessity which is the very essence of the holding of that case.

A. The Penalty Requirement of *Jackson*

The respondent states:

> For a due process violation to be found under *Jackson*, three factors must be present: A penalty which attaches to the assertion of a right; the chilling effect on the assertion of that right as an incident of the penalty; and, an alternative means of achieving a legitimate goal which renders the penalty needless. (Resp. Brief at 27.)

He then argues that,

> In the case at bar, the petitioner has failed to identify the penalty which is imposed upon a defendant who asserts his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a trial when the same judge participates in the plea negotiations and presides at trial. (*Id.* at 28.)

[3]390 U.S. 570 (1968).

The respondent's analysis is flawed because his view of the penalty requirement of *Jackson (see,* Resp. Brief at 28) is far too narrow. For example, even under the statute struck down in *Jackson,* it was entirely possible for a defendant to escape the death penalty after conviction upon a jury verdict, and therefore to suffer no actual penalty as an incident of his demand for a jury trial. The defect in the statute was not that it inevitably exacted a penalty for the assertion of a right but rather that it gave rise to the *potential* for penalty - a potential which could be avoided by a defendant who agreed to forego a jury trial. The due process violation lay in the fact that that potential for penalty, which advanced no legitimate State interest, naturally entered the defendant's decision-making process and needlessly encouraged him to waive his constitutional right to a trial by jury.

Similarly, as the clear weight of legal opinion recognizes, a potential penalty, incident to the assertion of the right to trial, arises whenever a trial judge participates in plea negotiations. That potential penalty, which looms over the negotiations, is the prospect of a trial conducted under hostile judicial influence and the possibility of a punitive sentence in the event of conviction.

It is undoubtedly true, of course, that a defendant who has engaged in unsuccessful plea negotiations with a trial judge may nevertheless be afforded a fair trial without punitive sentencing upon conviction. However, it is the *potential* for penalty that affects the defendant's decision-making process and needlessly encourages him to plead guilty. (*See, e.g., United States v. Werker,* 535 F.2d 198 [2nd Cir. 1976], *cert. denied,* 429 U.S. 926.) That potential satisfies the penalty requirement of *Jackson.*

B. The Test of Necessity

In an attempt to discount the seriousness of the potential for prejudice inherent in a trial judge's participation in plea negotiation, the respondent observes:

> Judges are frequently exposed to information which is at least as prejudicial as a defendant's participation in plea negotiations or his offer to plead guilty. A court may suppress evidence which conclusively establishes the movant's guilt or may have presided at the defendant's first trial which was reversed on appeal. Due process does not prohibit the court from presiding at trial in either example, nor does due process require a finding that the defendant's plea of guilty was involuntary because he believed that the court could no longer be impartial. . . .
>
> (Resp. Brief at 15.)

The petitioner agrees that, in much the same way that a trial judge's participation in plea bargaining would encourage a defendant to plead guilty, so too might the prospect of trial before a judge who has knowledge of inadmissible inculpatory evidence or who is aware of the defendant's previous conviction for the same offense.[4] The distinction, however, lies at the very heart of the *Jackson* holding: not all encouragement of guilty pleas is constitutionally unacceptable; rather, due process is offended only by the *needless* encouragement of the waiver of fundamental rights. *Cf.*,

[4]It could well be argued, however, that the encouragement to plead guilty attendant to judicial participation is greater since the defendant might reasonably fear that rejection of the plea offer will be viewed by the judge who made it as a personal rebuff. *Cf.* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (App. Draft 1968), Commentary, at 73.

Corbitt v. New Jersey, ____ U.S. ____, ____, 99 S. Ct. 492, 497 n.9 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17, 44 (1973) (MARSHALL, J. dissenting).

A defendant who seeks the suppression of evidence *must* address his motion to a judge who is then obliged to resolve it. Likewise, a defendant who successfully seeks appellate reversal and re-trial *must* submit to further proceedings conducted by a judge. Hence, in both analogies offered by the respondent, the judicial involvement, which may later prove a source of encouragement to plead guilty, is not only necessary but essential.[5]

[5]It may be asked, however, whether by extension of the petitioner's *Jackson* analysis, due process should require that the judge who presides at trial be other than the judge who entertained the suppression motion or who presided at an earlier trial subsequently reversed. Although the question need not be reached here, it may prove instructive to examine it against the *Jackson* concept of "needless encouragement."

Whether a practice is "needless" within the meaning of *Jackson* should be determined by balancing the danger the practice portends against the facility with which it can be revised. *See*, Note, *Plea Bargaining: The Case for Reform*, 6 U.RICH. L. REV. 325, 330 (1972). *Cf. Richardson v. Perales*, 402 U.S. 389, 410 (1971). The danger present in the analogies offered by the respondent is the same as the danger inherent in judicial participation in plea bargaining, *viz.*, that the defendant will be encouraged to plead guilty because of the fear that the trial judge, although assumed to be a man of conscience and intellectual discipline (*United States v. Morgan*, 313 U.S. 409, 521 [1941]) will nonetheless, either intentionally or subconsciously, allow his independent knowledge of damaging evidence or circumstances to influence his discretionary trial rulings or sentencing function.

In the respondent's analogies, this danger could be avoided only by mandating the transfer of individual cases from judge to judge. This solution, broadly applied, would present considerable difficulties since, in the words of the respondent, "the administrative burdens and costs imposed on an already strained court system, particularly in the small and single-judge jurisdictions, would be substantial." (Resp. Brief at 23.)

In contrast, in the case of judicial participation in plea bargaining, the same danger could be easily overcome by simply requiring judges to

(continued)

Similarly, although judicial rejection of a plea agreement reached independently by the parties (*see,* Fed. R. Crim. Pro. 11[e]) might well influence a defendant's later decisions, no needless encouragement to plead guilty results. Ultimately a guilty plea *must* be tendered to a judge who must then act as he deems best in accordance with the responsibilities of his position. *Bonner v. Wyrick,* 563 F.2d 1293, 1298 (8th Cir. 1977). Hence, again, judicial involvement is essential.[6]

In marked contrast, however, the participation of a trial judge in the actual negotiations for a guilty plea is entirely unnecessary. Indeed it is almost universally discouraged and

(footnote continued from preceding page)

refrain from actively engaging in a process in which, according to the consensus of legal opinion, they should play no part in the first instance. Judges may indeed be men of intellectual discipline, but "[t]he disciplined judicial mind should not be subjected to any *unnecessary* strain; even the most austere intellect has a subconscious." *United States v. Walker,* 473 F.2d 136, 138 (D.C. Cir. 1972) (emphasis supplied).

Finally, it should be noted that, contrary to the implication in the respondent's brief, (*e.g.*, at 23), the petitioner's argument is not wedded to any "substitute-judge" plan. Although the petitioner sees no constitutional objection to participation in plea negotiations by a judge who will not preside at trial (*cf., Commonwealth v. Rothman,* 222 Pa. Super. Ct. 385, 294 A.2d 783, 784-785 [1972] [Spaulding, J. concurring]; Note, *Plea Bargaining and the Transformation of the Criminal Process,* 90 HARV. L. REV. 564, 584 [1977]), he does not contend that the Conference Part concept employed in Kings County and elsewhere is *required* by due process. Petitioner argues only that a State is free to establish such procedures without offending constitutional principles, *See,* Note, *Judicial Participation in Guilty Pleas - A Search for Standards,* 33 U. PITT. L. REV. 151, 159-160 (1971).

[6]It has been suggested, though never required, that a judge who elicits a factual basis for a proffered guilty plea but who later rejects the plea should excuse himself from further involvement in the case. *United States v. Gallington,* 488 F.2d 637, 639 (8th Cir. 1973), *cert. denied,* 416 U.S. 907.

is absolutely forbidden in many jurisdictions. (*See, generally,* Resp. Brief at 18, n. 14-16.)

Hence the defect in the respondent's analysis of *Jackson* is its failure to take proper account of the crucial criterion of necessity. The analogies he offers in support of his position, therefore, are entirely inapposite to the issues at bar.

III.

ALTHOUGH THE INTERPRETATIONS OF THE RECORD OFFERED BY THE PETITIONER AND THE RESPONDENT DIFFER MATERIALLY, BOTH NEVERTHELESS REQUIRE REVERSAL IN THIS CASE.

The petitioner and the respondent have now offered significantly different interpretations of the record before the Court. The petitioner has argued that his interpretation demands reversal and the vacatur of his guilty plea. The respondent does not necessarily disagree with that conclusion (*see,* Resp. Brief at 33 n. 28), but argues instead that the "more logical" interpretation he offers demonstrates that the petitioner's guilty plea is valid and must stand.

In reply, the petitioner submits that not only is the respondent's construction inconsistent with the record, but, even if it were accurate, reversal would nevertheless be required. Moreover, even the respondent tacitly agrees that, at the least, a remand for an evidentiary hearing is necessary.

A. The Respondent's Interpretation Is Inconsistent With the Record.

The interpretation offered by the respondent is as follows:

> After. . . the pre-trial (*Wade*) identification hearing, petitioner was informed through counsel that if he pleaded guilty to robbery in the first degree, the court would sentence him to a term of imprisonment of six to twelve years. At the same time, Mr. Justice Held informed defense counsel that, if petitioner were convicted after trial, the court would impose a sentence of twelve and one-half years to twenty-five years, "(s)ubject of course of me (*sic*) reading the probation report (since) (i)t is a practice in my court when there is an armed robbery, to give. . . a maximum sentence, unless there are mitigating circumstances." (App. 28). Defense counsel and petitioner discussed the offer, which was ultimately accepted (App. 28).
> (Resp. Brief at 33.) (Footnotes omitted.)

This rendition simply cannot be reconciled with the record.[7]

[7]That disputed interpretations exist at all, of course, results from the fact that the actual plea negotiations were conducted off the record. Presented for review here is the transcript of a recorded exchange engaged in by the judge, counsel and the petitioner immediately prior to sentencing. In that exchange, accounts were given of the plea negotiations in an attempt to reconstruct the circumstances under which the guilty plea was offered.

In that light, it is instructive to examine one of the primary arguments now advanced by the respondent in this Court: "The participation of the judge in plea negotiations, whether or not he later presides at trial, is consistent with due process when conducted in open court in the presence of the prosecutor, and defense counsel and his client, *and when the proceedings are transcribed for appellate review. . . . The record and defense counsel protect the accused from an overbearing judge. Any improprieties in the proceedings will be readily discernible in the record.*" (Resp. Brief at 14.) (Emphasis supplied.)

Under the very test proposed by the respondent, then, the trial judge's participation in the unrecorded plea negotiations below was not "consistent with due process."

In an essentially uncontradicted account (*compare, United States v. Herron*, 551 F.2d 1073, 1077 [6th Cir. 1977]), defense counsel recalled that after a bench conference the judge had said he "would give six to twelve with the District Attorney's approval." (App. 28.) Counsel continued,

> I came back and said to my client six to twelve and he said no, and it went back and forth, and finally we arrived at a decision.
>
> * * *
>
> . . . We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at that time I did, Judge. I gave him that warning. (App. 28.)

A fair reading of this record demonstrates that two messages, rather than one, were sent to the petitioner by the trial judge. The first comprised the offer of a six to twelve year sentence to which the petitioner "said no." The second, alluding to the maximum sentence and viewed by counsel as a "warning," was delivered at the direction of the judge "prior to [the] time" the petitioner "arrived at the six to twelve year sentence," not prior to the time "he said no" to it. Thus, the petitioner initially rejected the plea offer and decided to accept it only after having received the warning from the judge.

Moreover, neither the affidavits submitted in support of the motion to withdraw the plea nor the separate accounts offered by the petitioner and his counsel made mention of any sentencing policy announced by the court. In fact, the one and only reference to any sentencing policy was made by the judge after counsel accused him of having threatened to

impose a twelve-and-a-half to twenty-five year term upon conviction after trial. The judge explained:

> It is a practice in my court when there is an armed robbery, to give a maximum sentence, unless there are mitigating circumstances. (App. 28.)

There is no suggestion in this comment that the existence of any "practice" had been made known to the petitioner or his counsel during plea negotiations. Interestingly, for the first time in this portion of the colloquy, the judge speaks in the present tense. Were the respondent's interpretation correct, the judge's statement would undoubtedly have begun with wording like: "I told you that it is a practice. . ." The record, then, makes plain that the reference to a sentencing practice was either an afterthought or a statement of policy unannounced during plea negotiations.[8]

Hence, the interpretation now offered by the respondent is inconsistent with the record and should be disregarded.

B. Even Under the Respondent's Interpretation of the Record, The Conduct of the Trial Judge Below Violated Due Process.

The respondent agrees that,

> Certain statements made by the court are by their nature inherently coercive, *e.g.*, "if you plead guilty, you will receive the minimum sentence; if you go to trial you will be entitled to no consideration from the court". . . . (Resp. Brief at 29-30.)

[8]It is of little significance that the judge may have said that the imposition of the maximum sentence upon conviction after trial would be subject to a reading of the probation report. A judge in New York is obligated by law to order and consider a probation report prior to imposing sentence. *See*, N.Y. Crim. Pro.L., Sec. 390.20(1) (Consolidated Laws of New York, Book 11A, McKinney's Supp. 1978); *People v. Selikoff*, 35 N.Y. 2d 227 (1974), *cert. denied*, 419 U.S. 1122. He is not obligated to follow its recommendations, however.

However, the respondent sees a difference of constitutional significance between that statement and the warning he claims was delivered below, *viz.*, that a rejection of the offer carrying a six to twelve year sentence would trigger, upon conviction after trial, the judge's policy of imposing a maximum sentence - here more than twice as severe - in the absence of undefined "mitigating circumstances." Unlike the respondent, the petitioner can perceive no difference of constitutional significance in the two instances.

First, the very announcement of a policy of imposing a maximum sentence upon conviction for armed robbery is constitutionally suspect for precisely the reason that, in direct violation of the principles of *Jackson*, it needlessly encourages the defendant to plead guilty. *United States v. McCoy*, 429 F.2d 739, 742-743 (D.C. Cir. 1970). Moreover, even assuming the constitutionality of such an announcement, and assuming further that the judge in fact adhered to any such sentencing policy, the timing of the announcement reveals its true purpose.[9]

There is no indication anywhere in the record that the alleged practice was made known to the petitioner or his

[9]The question of whether the judge did indeed have any such sentencing policy is not free from doubt. The petitioner actually pleaded guilty to the crime of armed robbery but received less than half the maximum permissible sentence. Therefore, if the judge did have a policy, he did not accurately represent it. His policy was not triggered by a conviction for armed robbery but rather by a conviction for that crime *after trial*. Hence, the policy turned not on the nature of the crime but on the defendant's demand for a jury trial. Such a practice is constitutionally unacceptable. *Cf. North Carolina v. Pearce*, 395 U.S. 711, 723-724 (1969).

counsel when the case first appeared in the judge's Trial Part - this although both indictments charged the crime of armed robbery. That the first announcement of the policy should be made simultaneously with a plea offer carrying a sentence of less than half the maximum demonstrates clearly that the judge's intention was to induce the reluctant petitioner to plead guilty.[10] That purpose was improper. *Euziere v. United States,* 249 F.2d 293 (10th Cir. 1957).

Plainly, then, even under the respondent's strained reading of the record, the judge deliberately employed his sentencing power to induce the unwilling petitioner to tender a guilty plea, and he did so by threatening to penalize the petitioner's reliance upon his legal and constitutional right to stand trial. The message of *North Carolina v. Pearce,*[11] *United States v. Jackson,*[12] *Chaffin v. Stynchcombe,*[13] and *Bordenkircher v. Hayes,*[14] is that such conduct is patently unconstitutional. *Corbitt v. New Jersey,* ____ U.S. ____, ____, 99 S. Ct. 492, 504 n. 7 (1978) (STEVENS, J. dissenting in an opinion in which BRENNAN, J. and MARSHALL, J. joined).

The petitioner contends that the bald judicial threat he discerns in the record requires reversal. It is respectfully submitted that the respondent's own interpretation of the same record requires no less.

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[10]The petitioner, of course, had earlier rejected a sentence offer of three-and-a-half to seven years, a term only slightly greater than the very minimum he could have received on the reduced charge of robbery in the second degree.

[11]395 U.S. 711 (1969).

[12]390 U.S. 570 (1968).

[13]412 U.S. 17 (1973).

[14]434 U.S. 357 (1978).

C. The Respondent Tacitly Concedes That, At the Very Least, This Case Must Be Remanded For an Evidentiary Hearing.

The petitioner interprets the record as demonstrating that, following the *Wade* hearing, a six to twelve year sentence offer was extended and rejected, and that upon learning of the rejection the judge in unadorned terms issued a warning that if the petitioner were convicted of the same offense after trial, "he is going to get twelve and a half to twenty-five." (App. 28.) The respondent candidly agrees that "if the petitioner's interpretation of the sequence of events is the correct one, he may well be entitled to the relief he seeks." (Resp. Brief at 33 n. 28.) The respondent does not contend that the petitioner's interpretation is unreasonable, but maintains only that his is "the more logical." (*Id.*)

Accordingly, since the respondent agrees that there is an interpretation of the record which is not unreasonable and under which the petitioner may be entitled to relief, he has tacitly conceded that, at a minimum, an evidentiary hearing is required to determine which of the proffered interpretations is accurate. *Cf., McMann v. Richardson,* 397 U.S. 759 (1970); *United States ex rel. McGrath v. LaVallee,* 319 F.2d 308 (2nd Cir. 1963); *People v. Earegood,* 12 Mich. App. 256, 162 N.W. 2d 802, 815 (Ct. App. Mich. 1968), *rev'd,* 383 Mich. 82 173 N.W. 2d 205 (1970). The petitioner, for his part, sees no need for a hearing, first because he believes his interpretation to be the only one fully consistent with the record, and second because he maintains that he is entitled to relief even if the respondent's interpretation is accepted by the Court. (*See* Sections 3A & 3B *ante.*)

IV.

THE FACTORS RELIED ON BY THE RESPONDENT TO DEMONSTRATE THE VOLUNTARINESS OF THE GUILTY PLEA ARE CLEARLY OUTWEIGHED BY THE EFFECT OF THE JUDGE'S COERCIVE CONDUCT.

The respondent contends that the relevant circumstances surrounding the guilty plea demonstrate that it was voluntarily offered. Specifically, he points to the petitioner's statements during allocution, the fact that he had previously withdrawn a guilty plea, the introduction of damaging evidence at the hearing which preceded the plea, the petitioner's background and experience, the reports of his Probation Department interview and psychiatric evaluations, and, finally, what the respondent condemns as "an effort on [petitioner's] part to thwart the prosecution of his two indictments." (*See,* Resp. Brief at 38-43.) The respondent concludes that "[w]hat emerges from the record is a shrewd and experienced plea bargainer rather than an intimidated and coerced victim of an overbearing judge." (*Id.* at 44.)

In point of fact, this "experienced plea bargainer" had shrewdly declined an offer carrying a three-and-a-half to seven year sentence only to be compelled later to accept a term of imprisonment nearly twice as great in order to avoid a threatened sentence twice greater than that. Further, his ultimate decision to plead guilty was clearly not a measured response to his assessment of the evidence against him; he had flatly rejected the very same plea offer after that evidence had been presented. Moreover, from the time his case was

first transferred to the Trial Part, the petitioner had apparently insisted that he wanted to stand trial. For some reason, however, the judge seemed intent on discouraging that desire.

A criminal defendant, no matter how shrewd, calculating or manipulative, will always be outmatched by any judge who, wielding his awesome power and position, chooses to enter into an adversarial struggle with him. However, there can be no legitimate excuse for such a struggle, especially when all the judge need do to avoid it is to afford the defendant his constitutional right to a trial. *Cf. People v. Heddins,* 66 Ill. 2d 404, 362 N.E. 2d 1260, 1263 (Sup. Ct. Ill. 1977) (Dooley, J., concurring). The judge below appeared determined to persuade the petitioner to forego that right, and to that end, he issued the threat that conviction after trial would bring the maximum sentence permissible. His efforts to induce the plea were successful; they were also unconstitutional.

Because of his vastly superior position and powers, the judge's coercive intervention in the plea bargaining process under the circumstances at bar outweighed any other factor, or combination of factors, suggesting that the petitioner's guilty plea was voluntary. The judge's threat was calculated to, and did, overwhelm the petitioner's choice. The guilty plea that resulted was therefore involuntary as a matter of law. *Euziere v. United States, supra.*

CONCLUSION

The respondent fears that to adopt the petitioner's reasoning in the case at bar "would cripple any viable system which encourages guilty pleas by offering substantial benefits." (Resp. Brief at 37.) That assertion is simply untrue and is belied by the experience of the federal courts and of the many state jurisdictions which prohibit judicial participation in plea negotiations.

Plea bargaining, and the attendant offering of benefits in return for pleas, will continue. However, negotiations will be conducted, as they should be, between prosecutors and defense counsel who "arguably possess relatively equal bargaining power." *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Opinion of BRENNAN, J. in which DOUGLAS, J. and MARSHALL, J. joined). Trial judges will simply be restored once again to their proper role in our criminal justice system.

The order below should be reversed.

Respectfully submitted,

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